THE
MODERN LAW REVIEW

Volume 19 September 1956 No. 5

PROPERTY, FREEDOM, SECURITY AND THE SUPREME COURT OF THE UNITED STATES *

NEVER has there been a greater need for the contemporary lawyer to take a step back every now and then in order to gain some distance from the mass of legal materials which are his daily concern, to extract some guiding trends and ideas from the flood of statutes, decisions, regulations and policy statements that make us lose sight of the wood for the trees.

Yet, all too few lawyers accept the challenge. For this, there are perhaps different psychological reasons in England and the United States. The English courts are shielded from the immediate impact of changing political ideologies by not having, like the Supreme Court of the United States, to interpret a written Constitution. Policy considerations arise in more subdued form, through the choice between different interpretations of statutes or the way in which precedents are applied or distinguished in the evolution of the common law. Probably, the constitutional position has reinforced an attitude deeply engrained in the English judicial tradition of avoiding the open discussion of policy issues whenever possible. It is the sincere conviction of the majority of English judges—and the legal profession in general—that legal evolution through the judiciary should proceed by implication rather than by explicit discussions of policy and principles. This certainly avoids the internal clashes and external attacks to which the Supreme Court of the United States is periodically exposed. An impression of continuity is given which supports the relatively even flow of British political life. The danger of this approach, however, is that policy issues, which arise often enough even in English cases, tend to be diverted into pseudo-technical arguments or that an inarticulate ideology is substituted for an articulate one. An outstanding example of this danger is the equation of private interest and public good in the consistent jurisprudence of the English court on covenants in restraint of trade. Today,

* *Security Through Freedom: American Political Thought and Practice* by A. T. Mason, Cornell University Press, London: Cumberlege, 1955.

when through the monopoly legislation of 1948 and subsequent developments, the issue of monopolistic and other restrictive trade practices has at last become a major public issue, it is perhaps easier to recognise what damage has been caused by the extraordinary though persistent doctrine of the House of Lords, that a restrictive agreement reasonable between the parties must also be presumed to be reasonable towards the public, even where the evidence presented to the court made it clear beyond reasonable doubt that the public had been exploited.[1] Hence the attempts made by some judges [2] and by other contemporary leading jurists, notably in the Hamlyn series, to see English law in perspective, fill a crying need. They may, in some measure, do for contemporary English legal science what Maine, Dicey, Maitland and Pollock did in previous generations.

The jurisprudence of the United States has, on the contrary, seldom suffered from lack of articulateness. The cardinal position of the Supreme Court in the interpretation of the Constitution has placed it in the middle of the battle. It has decisively influenced political and social developments in the United States. Never has the court been more the centre of public attention than in the last twenty years. The tremendous evolution of American political and legal life can be traced in large part from the historic trilogy of decisions of the court,[3] which abandoned many decades of bitter judicial opposition to legislative efforts in social and economic regulation, to the recent decisions condemning segregation in public schools,[4] and the even more recent decisions invalidating a number of state constitutional provisions on "the right to work" as interfering with Congressional legislation authorising Union Shop agreements.[5]

But the juristic analyses of these tremendous and potent developments are scarce. There have been few attempts to build up on Roscoe Pound's successive generalisations of legal trends and ideas. The American lawyer, even more than the English lawyer, is overwhelmingly preoccupied with a mass of legal materials. A few of the major law schools fight a rearguard battle for the preservation and development of "perspective" subjects, such as jurisprudence, against the pressure from state Bars and other circles for more and more "bread-and-butter" law. An element of fear, or at least caution, has been added in recent years. To survey the major jurisprudential developments means

[1] See, *e.g.*, *Northwestern Salt Co.* v. *Electrolytic Alkali Co.* [1914] A.C. 467.
[2] Notably Sir Alfred Denning, *Freedom under the Law* (1949); *The Changing Law* (1953), etc.
[3] *West Coast Hotel* v. *Parrish*, 300 U.S. 379 (1937), holding valid a minimum wage statute; *N.L.R.B.* v. *Jones & Laughlin Steel Co.*, 301 U.S. 1 (1937), sustaining the National Labour Relations Act; and *Stewart Marking Co.* v. *Davis*, 301 U.S. 548 (1937), sustaining the Social Security Act.
[4] *Brown et al.* v. *Board of Education of Topeka*, 347 U.S. 483 (1954).
[5] *Railway Employees Department, A.F. of L.* v. *Hanson*, Supreme Court Bulletin, Vol. 16 (1956), p. 943.

to take some stand on the vital issues of human freedom, property interests and State security. This has at times been a risky matter.

This is one, though certainly not the only, reason to welcome a slim book by the McCormick Professor of Jurisprudence at Princeton University, which presents an analysis of the major evolutions in the approach of the Supreme Court to some of the vital problems of American political and legal thought. The title of the book does not, however, accurately reflect its theme. The conflict between national security and personal freedom, which has played so large and disturbing a part in recent American history, is not its central subject. The book might more properly have been entitled "Property and Freedom"; for it is with the question, how far the elevation of the sacrosanctity of property into the central ideal of the American Constitution by the Supreme Court of the United States has impaired other freedoms, that this book is principally concerned. An inquiry into this problem inevitably leads to an analysis of the wider question, how far, and in what way, in a Federal Democracy, a judicial organ like the Supreme Court can exercise a decisive influence on political and social developments.

The theme of this book is not a novel one. The ways in which the Supreme Court for many decades turned (or it may be fairly said, perverted) the "due process" clauses of the Constitution into a bastion of private property rights, impregnable to changing economic conditions and social needs, has formed the subject of innumerable discussions. The dramatic climax came in the first years of the Roosevelt New Deal, when a majority of the court invalidated vital parts of the new social legislation,[6] and President Roosevelt made his unsuccessful bid for the power to appoint additional judges to the court. His avowed purpose was to break the stranglehold of the majority, which persistently defeated New Deal legislation in the name of "due process," disguising a bitter hostility to any kind of welfare legislation and economic State activities.

This move was happily defeated. Had it been successful, similar methods might well have been used by other Presidents for different purposes, and the authority of the court would have been hopelessly undermined. But Professor Mason suggests that the court saw the writing on the wall and made a strategic retreat by adopting an interpretation of the Constitution more consonant with the clearly voiced demands and needs of contemporary society.[7] It is a sobering reflection that to bring this about, no more was needed than that one judge should change his view

[6] *e.g.*, the Federal Agricultural Adjustments 1933, in *U.S.* v. *Butler*, 297 U.S. 1 (1936) and the New York Minimum Wage Act, 1933, in *Morehead* v. *Tipaldo*, 298 U.S. 587 (1936).

[7] See the cases quoted above, p. 462, n. 3.

and convert the five-four majority into a four-five minority.[8] Since then, what was for decades the outstanding problem of constitutional interpretation—the invalidation of urgently needed economic and social regulatory laws (federal and state) as inconsistent with "due process"—has virtually ceased to exist.

The court now generally accepts that economic and social legislation in a democracy is the expression of the will of the majority, through its duly elected representatives, and that it is not the business of a law court to interfere unless such legislation is clearly and manifestly incompatible with a plain constitutional prohibition. The court has, on the whole, adopted the Holmes philosophy as restated by Stone J. in his dissenting judgment in the Morehead case—

> "It is not for the courts to resolve doubts whether the remedy by wage regulation is as efficacious as many believe, or is better than some other, or is better even than the blind operation of uncontrolled economic forces. The legislature must be free to choose unless government is to be rendered impotent. The Fourteenth Amendment has no more embedded in the Constitution our preference for some particular set of economic beliefs than it has adopted, in the name of liberty, the system of theology which we may happen to approve."[9]

Professor Mason shows how clashing philosophies of property and community welfare have shaped the changing interplay between public opinion, Congress, Administration and Judiciary. One ineradicable consequence of the New Deal struggles has been the destruction of the myth that the nine men on the court are detached and dispassionate exponents of an abstract "rule of law." The members of the court came to be seen as men deeply enmeshed in their own prejudices and convictions, their struggles between passion and reason. The best of them have always been conscious of this human aspect of judicial responsibility. Men like Holmes, Cardozo, Brandeis, Stone, always knew that behind the sincere or pretended belief in absolutes lay either self-deception or prejudice, that the agony of judicial decision was to be aware

[8] The apparent switch was that of the late Mr. Justice Roberts who, in *U.S.* v. *Butler*, 297 U.S. 1 (1936) had written the opinion holding the taxes imposed by the Agricultural Adjustment Act to be unconstitutional, and who, in *Morehead* v. *Tipaldo* (mentioned above), sided with the majority in refusing to upset *Adkins* v. *Children's Hospital*, 261 U.S. 525 (1923), where the court had invalidated a minimum wage law for the District of Columbia on due process grounds. But the view shared by Professor Mason, that the switch by Roberts in the *West Coast Hotel* case was due to fear of the threatened "packing" of the court, has recently been refuted, simultaneously but independently, by both Justice Frankfurter and Dean Griswold (104 *University of Pennsylvania Law Review*, at pp. 313 *et seq.*, 340 *et seq.*). Both Frankfurter and Griswold show that Roberts in *Morehead* did not think that the *Adkins* case should be overruled until the court was asked to re-examine it, whereas in the *West Coast Hotel* case the issue was squarely raised. This does not, of course, affect the significance of the change in the balance of the court.

[9] 298 U.S. at p. 636.

of the policy choices without determining them by personal predilection, and that one guiding thought was self-limitation of the court lest it should become a non-elected law-maker superseding the legislature.

A very interesting consequence of the inevitable involvement of Federal Supreme Courts in such political and vital issues as the power of the community to interfere with the sanctity of property,[10] is the periodic swing from the clamour for judicial supremacy to the clamour for legislative supremacy and back again. As long as the Supreme Court was a firm and reliable guardian of property rights against social and regulatory legislation of any kind—whether it concerned maximum hours of work, minimum wages, provisions on child labour or uniform train schedules—business and industry, invariably and powerfully backed by the organised legal profession, praised judicial supremacy as a bulwark against the despotic will of the masses. But when the Supreme Court reversed its attitude in 1937,[11] the tune changed rapidly. Now the President of the American Bar Association [12] proclaimed that "reliance against the exercise of arbitrary power must be placed by the people henceforth in the legislative rather than in the judicial department of the National Government . . ." Perhaps this call for a curb on the court would have been louder and more persistent if the main features of the New Deal and the acceptance of state responsibility for social welfare and, at least in times of crisis, for control of economic activity, had not become part of the American way of life. Despite all its brave words about private enterprise and the evils of government interference, the Republican Administration has endorsed the main

[10] It arises openly in such Federal Constitutions as those of the United States, West Germany or India, which have an explicit catalogue of individual rights, and a court to pronounce on their scope. It arises indirectly in Constitutions which, like those of Australia and Canada, have no Bill of Rights, through judicial interpretation of the limits of federal power in relation to state power. In this way such clauses as s. 92 of the Australian Constitution: "On the imposition of uniform duties of customs, trade, commerce, and intercourse among the states, whether by means of internal carriage or ocean navigation, shall be absolutely free" or s. 92 of the British North America Act, which reserves legislation on property and civil rights to the Provinces (while s. 91 reserves to the Dominion a residuary power to legislate for the "Peace, Order and Good Government of Canada"), have become the source of bitter legal conflict not only about the respective spheres of federal and state power, but also about the limits of Government interference with private property and freedom of trade. The *Australian Bank Nationalisation Case* (1948) 76 C.L.R. 1; (1949) 79 C.L.R. 497; and the Privy Council decisions invalidating the Canadian "New Deal" (*e.g.*, the *Natural Products Marketing Act Case* [1937] A.C. 377) illustrate this point.

[11] In the *West Coast Hotel* case (see above) and in *National Labor Relations Board* v. *Jones Laughlin Steel Corp.*, 301 U.S. 1 (1937).

[12] Frank J. Hogan, *Reports of the American Bar Association*, 64 (1939), pp. 498 *et seq.*

tenets of social security and public concern with unemployment and depression.[13]

During the second World War, and in the post-war years, the Supreme Court has, however, become deeply involved in another set of basic policy issues. These revolve around three major themes: first, the inroad of the demands of national security upon freedom of speech and other aspects of individual liberty; second, the limits of the power of collective bargaining organisations to compel the dissenting individual, symbolising the wider issue of the growing power of corporate organisation over the individual; third, and perhaps gravest of all, the issue of legal equality between whites and negroes.

The impact of the second World War as well as of the "cold war" stresses of the post-war period on American public opinion gives some general guide to the evolution of judicial thinking. The second World War strengthened the sense of unity and the urge for social justice between different classes and groups of the American population. Negroes were fighting for America side by side with white Americans. Organised labour, which had gained its proper legal status in the New Deal period, grew enormously in importance and numbers, and came to be recognised as a vital element of American public life. On the other hand, the shock and disillusionment of the "cold war" period, coupled with a powerful and almost mythical distrust of any kind of left-wing ideology, produced a super-sensitive consciousness of security and subversion, to the detriment of the cherished freedoms embodied in the Bill of Rights. At the same time, recent years have brought a certain reaction against the phenomenal growth in the economic power, the social status and the coercive functions of organised labour, a counterpart to the continuous but inconclusive struggle against concentration and monopoly in business, which is expressed by anti-trust legislation. Here there is a parallel to English developments, although the legal form in which the issue is expressed is different. In England, the recent cases of *Lee* v. *Showmen's Guild* [14] and *Bonsor* v. *Musicians' Union* [15] have raised the problem of the limits of autonomy to be enjoyed by trade unions, which, though private in form, enjoy *de facto* public powers in the labour movement. It is possible that a "closed shop" agreement might in certain circumstances be held to be against public policy, unless officially authorised by Parliament. The question of any constitutional limitations on the scope of collective bargaining does not arise. In the United States, the main issue is characteristically a constitutional one: the power

[13] The most important controversial issue in the struggle between public and private power production is, perhaps, the one major issue on which, apart from personalities, Democrats and Republicans defend opposite philosophies.

[14] [1952] 2 Q.B. 329.

[15] [1954] Ch. 479 (C.A.); [1955] 3 W.L.R. 788 (H.L.).

of the different states to enact "right of work" statutes, without interfering with the federal authorisation of collective bargaining between labour organisations and employers, including compulsory union membership.

In the matter of national security versus individual freedom, the Supreme Court has to some extent yielded to the temper of American public opinion, over the strong protests of a minority, now generally reduced to Black and Douglas JJ., although in many recent decisions Chief Justice Warren, a nominee of the Eisenhower Administration, has joined the "liberal" minority. In *Dennis* v. *U.S.*,[16] the court upheld the conviction of eleven Communist leaders under the Smith Act of 1954, which it thereby declared constitutional.[17]

Although the court professed to apply the "clear and present danger" doctrine developed by Holmes J. in *Schenck* v. *United States*,[18] it went, in effect, far towards holding that mere membership of certain political organisations, without any specific attempt to overthrow the Government by force and violence, or of any evidence of present intention to do so, was sufficient to fulfil the requirements of that Act.[19]

That, at least, is the net result of the majority opinion, although there are, as so often, different philosophies underlying the various judgments. Frankfurter J., who concurred with the majority, reasserted his often expressed philosophy that, even in matters of freedom of speech, the court should not substitute its own judgment for that of the legislature, even if it would have struck the balance between national security and personal freedom differently. But most of the judges accepted the Congressional judgment that membership of an organisation deemed to be prepared to overthrow the Government by force and violence if opportunity served, was evidence of "clear and present danger."

> "The mere fact that from the period 1945 to 1948 petitioners' activities did not result in an attempt to overthrow the Government by force and violence is of course no answer to the fact that there was a group that was ready to make the attempt. The formation by petitioners of such a highly organised conspiracy, with rigidly disciplined members subject

[16] 341 U.S. 494 [1951].

[17] s. 2 (a) (1) of the Smith Act makes it unlawful "to knowingly or wilfully advocate, . . . or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence . . ."; s. 2 (a) (3), "to organise or help to organise any society, group, or assembly of persons who teach, advocate, or encourage the overthrow . . ."

[18] 294 U.S. 47 [1919].

[19] Since then, the Communist Control Act of 1954 has declared "that the Communist Party of the United States, although purportedly a political party, is, in fact, an instrumentality of a conspiracy to overthrow the Government of the United States" and that "its role as an agency of a hostile foreign power renders its existence a clear, present and continuing danger to the security of the United States" [50 U.S. C. (1955 Supp.) para. 841].

> to call when the leaders, these petitioners, felt that the time had come for action, coupled with the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned, convince us that their convictions were justified on this score" (*per* Vinson C.J.).

The contrasting philosophy was expressed by Douglas J.

> "Not a single seditious act is charged in the indictment. To make a lawful speech unlawful because two men conceive it is to raise the law of conspiracy to appalling proportions. That course is to make a radical break with the past and to violate one of the cardinal principles of our constitutional scheme."
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> . . . .
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> "The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated."

In the *Dennis* case, the court went some way towards appeasing the vocal and influential sector of Congressional and public opinion, which would rather impose serious restrictions on freedom of speech, association and movement than curtail the wide sweep of recent legislation dealing with subversive activities and associations.[20] But more recently, the court, perhaps under the influence of its new Chief Justice, who wrote the unanimous opinion of the court in the school segregation case, and who has been consistently

[20] Serious problems have arisen not from the safeguarding of the security of the State as such—which is universal and indispensable—but from the very wide official definitions of "subversive associations." The U.S. Attorney-General's list enumerates 314 associations "membership in, affiliation with or sympathetic association with" which will normally preclude or terminate employment by the Federal Government (and generally also by the very large proportion of industries which have any contracts under the Defence Programme). Recently, some modest administrative and judicial curbs have been imposed on the arbitrary use of these tests. Thus, the Secretary of the Navy restored, after public protests, the commission of a naval cadet of immaculate standing who had been refused the commission because his mother had, in the past, had Communist affiliations. A legless World War II veteran—a Trotskyite—had his pension restored—after many years. The Supreme Court overruled a decision of the Loyalty Review Board which had barred a distinguished Yale Professor of Medicine from his position as government consultant on the ground of reasonable doubt as to his loyalty. But the court decided the case on excess of jurisdiction and avoided the constitutional issue. *Peters* v. *Hobby*, 349 U.S. 331 (1955). The important question of the right to a passport—which must be applied for every time a United States citizen wishes to go abroad (other than to Canada and Mexico)—is likely soon to come before the Supreme Court. In the United States, the issue of a passport is regarded not as a right but as a privilege to be granted in the discretion of the Passport Office. A lower court recently held that a passport must not be withheld without reason, reviewable by the court.

a strong supporter of elementary individual freedoms against undue political persecution, has put important brakes on excessive curtailment of individual rights in the name of state security. In the very last decision of its momentous 1955–1956 session, the court granted the appeal of a food and drug inspector in the New York Division of the Department of Health, Education and Welfare, who, in 1953, had been fired without a hearing, after having been accused of associations with persons "reliably reported to be Communists" and of attending meetings of the Nature Friends of America, one of the 314 organisations on the Attorney-General's list of subversive organisations. The dismissal was based on an executive order of the Eisenhower Administration, allegedly authorised by a 1950 Act of Congress which provided for summary suspension and firing of federal employees "in the interest of national security," but the Act specifically listed eleven security sensitive agencies to which this removal of the usual safeguards against summary dismissals was to apply, although it gave the President discretionary authority to apply the Act to any other agency "in the best interest of national security." The attacked executive order simply extended the application of the Act to all government employees, large numbers of whom (although it is not exactly known how many) were fired as security risks under this extension. The court, by a six to three majority, held that Congress meant the Act's extraordinary procedures to apply only to persons in sensitive positions, and that the executive order was therefore *ultra vires* in so far as it extended the Act to other agencies. Consequently, the dismissed inspector was reinstated, and the Department of Justice immediately declared its intention to comply with a ruling of the court in regard to this and other employees.[1]

In another very recent case, *Pennsylvania* v. *Nelson*,[2] the court invalidated the conviction by a Pennsylvania court of a Communist under the Pennsylvania Sedition Act. It held that federal legislation in this field, represented by the Smith Act of 1940, the Internal Security Act of 1950, and the Communist Control Act of 1954, pre-empts the field of offences against the security of the United States. This has aroused the ire and suspicion of state interests, inflamed by the court's decisions in the other two major issues mentioned earlier.

On "the right to work" issue, the court has stood firm in upholding the supremacy both of collective bargaining by labour unions recognised in accordance with federal laws, and the supremacy of federal legislation over state constitutions which had, in recent years, enacted provisions like the following:

> "No person shall be denied employment because of membership in or affiliation with, or resignation or expulsion from a

[1] *Cole* v. *U.S.*, as reported in *The New York Times*, June 17, 1956.
[2] April 2, 1956, *Supreme Court Bulletin*, Vol. 16, p. 625.

> labour organisation or because of refusal to join or affiliate with a labour organisation; nor shall any individual or corporation or association of any kind enter into any contract, written or oral, to exclude persons from employment because of membership in or non-membership in a labour organisation." [3]

It has invalidated such provisions, for example, in the recent case of *Railway Employees Department (A.F. of L.)* v. *Hanson* [4] at a time when, especially in the South, opposition against the powerful position of labour unions combines with resentment against the racial equality doctrine advocated by the now united A.F.L.–C.I.O. Labour Organisation as well as by the Supreme Court. This has produced a new wave of attacks upon the court, recently endorsed by a conference of state Attorneys-General.

The most dramatic issue—perhaps the most explosive legal issue since the *Dred Scott* case—is that of racial equality. The Fourteenth Amendment ordains that " no state shall deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws." In 1896, the court, in the case of *Plessy* v. *Ferguson* [5] (involving transportation), devised the " separate but equal " doctrine, which it later applied to the field of public education. This partly responded to, and partly encouraged, the almost universal practice of the southern states to have separate educational institutions for negroes. Since the beginning of the last war, the Supreme Court had begun to undermine this doctrine by finding, for example, in *Sweatt* v. *Painter* [6] that a segregated law school for negroes did not provide equal educational opportunities. But the great test came with the question of segregation in the public schools, which affects the entire population, not a small minority. A unanimous court held that segregation was unconstitutional,[7] although in a further opinion on the question of relief,[8] the court permitted great elasticity as to the manner of implementing this judgment. It placed the primary responsibility for solving local organisational problems with the school authorities, under the supervision of the courts. It required " a prompt and reasonable start " towards compliance, rather than immediate and complete implementation. It gave full liberty to the courts to consider administrative, transport, personnel, and other problems in judging the adequacy and timing of measures taken.

Despite this mitigation of absolute legal principle by statesman-like administrative flexibility, this decision of the court has given rise to the most powerful movement of organised opposition not only to the authority and function of the court itself, but to the whole concept of the supremacy of the Federal Constitution over

[3] Nebraska Constitution (Art. XV, para. 13).
[4] *Supreme Court Bulletin*, Vol. 16 (1956), p. 943.
[5] 163 U.S. 537. [6] 339 U.S. 629.
[7] *Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954).
[8] 349 U.S. 294 (1955).

the states, since the Civil War. A hard core of about seven southern states, led by Virginia, is determined to resist the implementation of the Supreme Court judgment. In order to find a thin cloak of legal justification for what is essentially a political revolt, the concept of "interposition," a kind of restatement of the compact theory of Federation, has been devised. It means simply that the state power in matters of education is "interposed" between any decision of the Supreme Court on a constitutional issue, and its implementation by the state. Further nourishment to this opposition has been supplied by the above-mentioned judgments of the court invalidating state actions impliedly conflicting with federal legislation in the fields of sedition and labour organisation. Nor would the Supreme Court be any longer strongly defended by industrial and business interests, as it was before its historic "betrayal" in 1937. While the composition of the court has changed sufficiently to remove it from what, in the eyes of the business world, is the taint of New Dealism or left-wing associations, it is certainly no longer the ardent and adamant defender of absolute property rights against legislative encroachment which it was for the better part of a century.[9]

The 1955–1956 session, from which most of the above decisions are quoted, has been described in the *New York Times* as "one of the most notable terms" in the history of the court. In this historic session, the court has set definite limits to the indiscriminate extension of national security to the detriment of elementary personal safeguards, such as the right of a civil servant to be heard before summary dismissal; it has striven to set limits to the duplication of federal and state legislations in matters of national concern by upholding the implicit incompatibility of state laws with federal laws where the latter could be deemed to have preempted the field; it has reaffirmed the supremacy of the collective bargaining principle enshrined by the New Deal legislation as a basic aspect of modern industrial life in the United States, again implicitly reducing the power of the states to enact contrary legislation. It has, above all, firmly stood by the principle of racial equality as a cornerstone of the Constitution, rejecting the subterfuge of the "separate but equal" doctrine and risking the bitter opposition of not only the states of the deep south, but of influential sections of Congressional opinion.[10]

[9] The invalidation of President Truman's seizure of most of the steel mills in order to avert a nation-wide strike during the Korean war (*Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952) by a six to three majority, was based primarily on the court's view that the President had arrogated to himself legislative power, rather than on a defence of the sacrosanctity of private property.

[10] The present Chairman of the influential Senate Judiciary Committee is Senator Eastland of Mississippi who has openly advocated the defiance of the Supreme Court ruling in the school segregation case. Senator Eastland is Chairman by virtue of the unwritten but strongly entrenched rule of seniority in the Senate.

It is not surprising that the combination of these decisions on sensitive aspects of federal-state relations as well as of individual rights has provoked the most strongly organised and vocal opposition to the court in many years. At the time of the writing of this article, a number of Bills were pending before the court, all tending to limit or discredit the jurisdiction of the court. The more serious and ominous of these proposals include a Bill to grant the states and the Federal Government concurrent jurisdiction in all areas unless federal statutes *expressly* pre-empt the field. As the Chairman of the Judiciary Committee of the House of Representatives has put it,[11] "such proposals would completely balkanise the government, leaving in complete confusion all interpretations of the Inter-state Commerce clause of the Constitution. . . . National problems would be dealt with by a welter of laws of forty-eight states. They would contradict and cancel each other out, leaving the Federal Government helpless to resolve the confusion." Another parallel proposal would give the states concurrent jurisdiction with the Federal Government in crimes involving subversion against the United States. As Mr. Celler has pointed out in the above-mentioned letter, the Nelson decision of the Supreme Court does not in any way impair the power of the states to enact legislation on subversive activities in so far as it affects the states. It only impairs their legislation in so far as it purports to legislate concurrently with the federation on matters affecting *national* as distinct from *state* security. Even more ominous proposals would limit the appellate jurisdiction of the Supreme Court in constitutional matters.

It is likely, however, that most, if not all, of these proposals will eventually die a well-deserved death. In the last resort, the American people, regardless of political differences and momentary irritation, regard the Supreme Court as a bulwark of stability and relative impartiality in the turmoil of politics. A strongly democratic Congress rejected President Roosevelt's proposal to pack the court. Similarly, it may be predicted that at least the wilder current proposals directed against the court will not go very far. It should also be pointed out [12] that, in the majority of constitutional cases that come before the Supreme Court, there is a give and take between Congress and the court. In the vital sphere, for example, of the federal powers in matters of inter-state commerce, the scope of that power, which often comes to be determined by the Supreme Court, is subject to amending Congressional legislation which may or may not have covered that field. Indeed, quite often a decision of the Supreme Court will, in these matters, direct the attention of Congress to some legislative reform, an interplay that would be comparable to the relation

[11] Emanuel Celler in a letter to *The New York Times* of June 17, 1956.
[12] On this point, see in particular Wechsler in *Federalism, Mature and Emergent* ed. by A. W. MacMahon (1955) at pp. 108 *et seq.*

between English courts and Parliament, except for the much more complex machinery of the legislation in a federal system.[13] It is true that even in this sphere, Congress can at least undermine the position of the court by such measures as have been previously described as pending before Congress at this time. The more basic clash arises, however, in the field of basic constitutional guarantees which can only be altered legislatively by an amendment of the Constitution. These amendments—of which, in the whole history of the United States, there have been only twenty-two—are almost impossible to attain, except in times of extraordinary emergency or near revolution. It is for this reason that the decisions of the court in the school segregation case and other issues involving the position of negroes and whites have provoked a major crisis. It is beyond the dreams even of the most radical Southerner to obtain an amendment of the relevant clauses of the Constitution. Any other attempt to circumvent the decisions, *e.g.*, by the "interposition" doctrine, is a more or less open defiance of the court and of the Constitution. It is for this reason that it took particular courage on the part of the court to give the ruling it did—unanimously—in the school segregation case.

In the last generation, the Supreme Court has thus been successively concerned with, and played a decisive role in, the shaping of such vital issues as the balance of property interests against public welfare, of individual freedom against national security, of the rights of unorganised workers against the union shop, of the pre-emption of state powers by federal legislation, and of racial equality in matters of political franchise and education. Inevitably, the question of the relationship between the various constitutional freedoms and privileges has arisen. It leads deep into the question of the foundations of a modern democratic society.

It was Chief Justice Stone who, as early as 1938, in the otherwise obscure case of *U.S.* v. *Carolene Products Company*,[14] with the "casualness of a footnote,"[15] laid the foundation of what later became known as the doctrine of the "preferred freedoms."

> "Regulatory legislation affecting ordinary commercial transaction is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of

[13] Involving the concurrent legislation of two Houses of Congress one of which, *i.e.*, the Senate, represents state power to an extraordinary degree, as every state, big or small, has an equal number of two Senators. In this way, the smaller states, with a small minority of the total population, have a kind of veto power on federal legislation. This is even greater in regard to international treaties, which require approval by a two-thirds majority of the Senate.

[14] 304 U.S. 144 (1938).

[15] Justice Frankfurter's words in *Dennis* v. *U.S.*, 341 U.S. 494 (1951), at p. 526.

such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.

"It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial inquiry under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . .

"Nor need we inquire whether similar considerations enter into the review of statutes directed at particular religious . . . or national . . . or racial minorities . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."

As Professor Mason points out, the groundwork for this development had been laid in certain earlier opinions of Justice Holmes, Justice Brandeis and Chief Justice Hughes. In the *Flag Salute* case,[16] Chief Justice Stone applied his doctrine as a lone dissenter, condemning the state power to require the flag salute of school children as a patent destruction of religious freedom.[17] Among Chief Justice Stone's disciples in this belief may be mentioned the late Justice Jackson, and Justices Black and Douglas, the latter two almost consistent dissenters from the majority on matters of personal freedom. In 1943, Justice Jackson wrote—

"Much of the vagueness of the due process clause disappears when the specific prohibitions of the First (Amendment) become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect." [18]

The most redoubtable and articulate opponent of this interpretation is a member of the court who might well be regarded as deeply influenced by the judicial philosophy of Holmes, Cardozo and Stone himself. When agreeing with the majority in the upholding of the conviction of eleven Communist leaders for violation of the Smith Act in the *Dennis* case,[19] and in other

[16] *Minersville School District* v. *Gobitis*, 310 U.S. 586 (1940).

[17] For an analysis of Stone's approach to the constitutional protection of liberty, see Wechsler, "Stone and the Constitution," 46 Col.L.R. 764, at pp. 793 *et seq.*

[18] *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943), at p. 639.

[19] *Dennis* v. *U.S.*, 341 U.S. 494 (1951), at p. 526.

decisions, Frankfurter J. condemned the "preferred freedoms" doctrine in forthright terms. He asserted his belief that the transgression of constitutional liberties no less than social and economic regulation is best left to the legislature rather than to a court.

> "Except where the transgression of constitutional liberty is too plain for argument, personal freedom is best maintained—so long as the remedial channels of the democratic process remain open and unobstructed—when it is engrained in a people's habits and not enforced against popular policy by the coercion of adjudicated law." [20]

In the same case, Black and Douglas JJ. expressed the Stone philosophy in vigorous terms, according to free speech "an exalted position" in the structure of American society, and erecting a barrier against Congressional laws suppressing freedom of speech in the name of Congressional supremacy, or against judicial notions of "reasonableness."

The present writer agrees with the basic approach to the judicial interpretation of constitutional matters, as it was first developed by Holmes and carried on by Brandeis, Cardozo, Stone, Frankfurter, and others. This approach means a distrust of absoluteness, not—as it is so often asserted by the proponents of the Natural Law doctrine—because there are no values to be believed in, but because the vast majority of constitutional issues can only be decided on an often delicate and shifting balance between conflicting values. In a free society, the balance between national security and personal freedom, between legitimate regulation of, and even far-reaching interference with, private property for the sake of generally recognised social needs, can never be stated in absolute and immutable terms. Recent U.S. history shows that the degree of judicial tolerance of infringement of personal freedom for the sake of national security varies with the intensity of real or apprehended danger from abroad. Again, it can be safely predicted that a major economic depression and unemployment crisis will find a conservative Republican Government almost as willing, or as compelled by circumstance, to engage in commercial regulatory or even entrepreneurial activities as a New Deal Democratic Government.[1] The adherents of

[20] *A.F. of L.* v. *American Sash and Door Co.*, 355 U.S. 538 (1949), at p. 599. In an earlier monograph *Mr. Justice Holmes and the Supreme Court*, published in 1938, (Professor) Frankfurter had to some extent accepted the "preferred freedom" theory. "Especially in a civilisation like ours, where the economic independence of society is so pervasive, a sharp division between property rights and human rights largely falsifies reality . . . But the various interests of human personality are not of equal worth. There is a hierarchy of values": at p. 49.

[1] The impact of external danger on judicial interpretations of freedom, even in a country like Great Britain, with far less judicial exposure to political controversy, can be seen in cases like *Liversidge* v. *Anderson* [1942] A.C. 206, followed by the peacetime reaction of *Nakkuda Ali* v. *M. F. De S. Jayaratne* [1951] A.C. 66.

Natural Law philosophy delude themselves, not in believing that there are certain values higher than others, but in believing that these are absolute and immutable, instead of being the expression of a particular political philosophy at a given time.

For this reason, this writer sees no difficulty in reconciling the "balance of interests" philosophy, a basically relativist approach, which distrusts juridical absolutes, with the "preferred freedoms" doctrine of Stone, Jackson or Douglas. Every Constitution has its ultimate foundations, its basic postulates or, in kelsenian language, its "initial hypothesis." The difference between, on the one hand, those who, like Kelsen, believe values to be outside the realm of legal science or, like Radbruch, articulate them as matters of choice and belief, not of scientific proof, and, on the other hand, those who, like the Scholastics or the Rationalists, believe human values to be deducible from Divine or human reason, lies simply in the source of the legal postulate. To hold, with Stone or Douglas, that for the American Constitution, which has embodied the values of a democratic society, the "Bill of Rights" Amendments are more basic than immunity of private property or contract from regulation in the public interest, simply asserts, rightly or wrongly, that these are the values in the light of which the court has to interpret the American Constitution, the basic law of American democracy. Another Constitution may require a different interpretation. What this approach does *not* assert, is that any human values are immutable because they are grounded in the Law of Nature.

It is idle to expect—nor does Professor Mason believe—that the controversies surrounding the Supreme Court will cease. The court is no longer basically divided on the issues that split it in the middle thirties. It is divided on other matters, as is inevitable when nine men of different background and philosophy, and not made to conform by fear, decide on vital human issues. Nor is it surprising that the attitude of the different social groups—industry, organised labour, churches, etc.—towards the supremacy of the court in constitutional matters should be influenced by their sympathies towards the principles which it lays down at a given time. In Federal Democracies like those of the United States, India, Australia or Canada, the courts cannot evade basic political issues arising from the interpretation of a Constitution. They have to keep a precarious balance between the Scylla of unawareness of political issues where they do inescapably arise, and the Charybdis of confusion of their personal political beliefs with the law.

Such a task—which British judges do not normally have to face—has its dangers as well as its advantages. A comparative student of the philosophy and psychology underlying the judgments of the House of Lords as compared with those of the United

States Supreme Court can admire the balance and the cool detachment with which the British judge can keep above the turmoil of political battle. But this attitude can lead sometimes to the deceptive belief that, as Lord Finlay put it in *The King* v. *Crown Milling Company*,[2] " it is not for this tribunal, nor for any tribunal, to adjudicate as between conflicting theories of political economy," with the result that vital policy issues are ignored even where they do matter.[3] Nobody can accuse the present-day Supreme Court of the United States of such unawareness. The price to be paid is often sharp and, on occasions, bitter conflict within the court, and its exposure to the turmoil of political controversy.

It is likely that the Supreme Court of the United States will survive the onslaught substantially unimpaired, and that it may even emerge from it with enhanced prestige. When the court in 1937 freed itself from the shackles of an inflexible and prejudiced *laissez-faire* philosophy, it saved its soul. It restored the Constitution to a living and developing instrument not designed to prevent the legislature from keeping in step with vital economic and social changes. Since then, the court has been deeply conscious of its dual function, as a relatively impartial and detached pillar of the rule of law in the incessant turmoil of the American political system, and as the articulate conscience of the nation (within the limits of the Constitution). The court has been increasingly aware of the element of statesmanship inherent in its judgments. Especially in the school segregation case, it has attempted to be statesman as well as judge. The implementation of the judgment may take longer than expected. Some states may defy the judgment almost to the point of civil revolt. But it is likely that, within a generation or less, the judgment will have been fully implemented.

There will, at any given time, be powerful groups and interests bitterly opposed to the role of the court. But in the delicate balance of political forces that make up the American body politic, it seems to fulfil an indispensable function which it appears, on the whole, to discharge with greater wisdom today than half a century ago.

W. FRIEDMANN.*

[2] [1927] A.C. 394.

[3] In that very case the Privy Council decided in favour of a *laissez-faire* economy, and effectively killed the New Zealand Anti-Monopoly legislation by holding that a highly restrictive flour millers' cartel, which included elimination of competition, restriction of output, price-fixing, and exclusionary powers, was not against the " public interest " in the sense of the Commercial Trusts Act, 1910.

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"REASONABLE FORESIGHT OF NERVOUS SHOCK"

THE purpose of this article is to relate the existing medical knowledge on the causation of nervous shock with the legal opinions as to liability for nervous shock caused inadvertently.

The reasoning which sets up nervous shock as a separate tort is fairly characteristic of the prevailing confusion as to the causation of damage from emotional shock. This has been enhanced by difficulties in terminology,[1] which has led to breakdown in communication between Medicine and the Law on the subject. Furthermore the position has not been assisted by inaccurate observations on causation which have appeared in legal periodicals, and, in some cases, have seeped into the courts.[2] The necessary co-operation between medicine and the law is probably delayed by the fact that the two professions appear to be out of sympathy with each other over the question of personal damages. "It is all very well to say that the law should keep pace with modern psychology and psychiatry. People who say this are apt to forget that the administration of justice is a practical art which involves a great many policy considerations outside the frame of references of science." This statement by a recent legal writer[3] sums up what can only be called the "ostrich" attitude of some lawyers. Equally uncompromising are the words of a recent medical writer[4]: "Medicine is a practical subject in which all interest must be massed on the actual patient and his clinical state. Thus medical men find it hard to comprehend or approve any system in which the sufferer is neglected in favour of a theoretical approach to the financial alleviation of injury."

The first step in assessing liability for personal damage of any kind is to establish the medical connection between the alleged damage and the act or omission in question. This preliminary inquiry is not concerned with any qualification such as the proportion of the damage caused by the act, the contribution of pre-existing damage, or the effect of susceptibility to the type of

[1] *e.g.*, in medical terminology the term "shock" is used in at least two completely different senses.

[2] A notable culprit is the note appearing in (1933) 11 Can.Bar Rev. 516, which not only confuses surgical shock (which has nothing to do with emotion) with nervous shock, but also states that irreversible organic changes, *i.e.*, physical damage, may occur in the nervous system tissue as a result of emotional shock. This proposition, which can be supported by no medical authority whatsoever, clearly influenced Evatt J., who quoted it in *Chester* v. *Waverley Corporation* (1939) 62 C.L.R.I. 1, in a judgment which Lord Wright thought "will demand the consideration of any judge who is called upon to consider these questions": *Bourhill* v. *Young* [1943] A.C. 92 at 110.

[3] McIntyre (1953) 31 Can.Bar Rev. 775.

[4] Murphy (1952) J.Irish Med.Assn. 186.

damage suffered; it is concerned solely with the question whether the alleged personal damage, or any part of it, can be connected in the medical sense with the act which is alleged to have been negligent. If there is no evidence of such connection the action will fail.

The next step is to determine what damage is actionable in negligence. For reasons of policy the courts have restricted recovery for nervous shock to that resulting in physical illness; in other words mental distress unaccompanied by such illness will not be actionable.[5] This restriction requires analysis in terms of medical causation. Damage from emotional shock may be, in medical language, "somatic" or "psychic," and not infrequently it is a combination of both. These terms mean respectively "organic" (*i.e.*, physical) and "mental" (*i.e.*, non-physical). Organic sequelae of an emotional shock would include miscarriage, coronary thrombosis and cerebral haemorrhage ("stroke"). Psychic sequelae would include hysteria and various neuroses. It is important to note that psychic damage may give rise to physical symptoms; hence conversion hysteria (purely psychic damage) may give rise to paralysis of one or more limbs, a condition which would clearly rank as physical illness for legal purposes.

It is especially important to understand this point in relation to the threatened emergence of nervous shock as a separate tort.[6] It is not clear what is meant by this development. It could mean that damage (whether organic or mental) from emotional shock must be kept separate from damage due to other damaging agencies (*e.g.*, physical impact). On the other hand it could mean that mental damage must be kept separate from organic damage. Whichever interpretation is adopted, the medical implications will

[5] See however *Austin* v. *Mascarin* [1942] 2 D.L.R. 316, in which "interference with the physical well-being" of a mother who had seen her child injured in an accident was held actionable in negligence. It appears that an action in negligence must be sustained by something more than a temporary disturbance, whether physical or emotional. The position with intentionally inflicted harm is not clear. Note however that "interference with health and comfort" amounts to "actual bodily harm" within the Offences against the Person Act, 1861, c. 100, s. 47, Archbold, 32nd ed., 959. Hence in *R.* v. *Miller* [1954] 2 Q.B. 282 "interference with the state of mind for the time being" was held within the section, *per* Lynskey J. at p. 292. For an American case allowing recovery for intentional invasion of "mental tranquillity" see *Barnett* v. *Collection Service*, (1932) 242 N.W.Rep. 25 (Supreme Court of Iowa), in which the plaintiff suffered mental pain, anguish, and humiliation as a result of receiving threatening letters from the defendant.

[6] "Perhaps it may be objected that we have no warrant for thus distinguishing mental health and security of bone and muscle. But history and certain practical considerations require that these be considered apart, whatever a stricter abstract adherence to biological science might dictate": Pound (1916) 28 Harv.L.R. 356. He did however admit that the advance of medical science would determine the development of the law on this point. See also Bohlen, *Studies in the Law of Tort* 252; Goodhart (1953) 16 M.L.R. 22; Ellis Lewis in Winfield, *Tort*, 6th ed., 92; Dias (1955) C.L.J. 201; and Machin (1954) 17 M.L.R. 413 (who discusses the separate "body and mind safety interests" considered below). The view is also implicit in the judgments of Bankes and Sargant L.JJ. in *Hambrook* v. *Stokes Bros.* (*infra*).

render any practicable application impossible, as the distinction will depend on a specificity of damage which would be against all modern medical experience. One way of expressing the distinction is to create separate " body safety " and " mind safety " interests, with the result that the defendant will not be liable for directly consequential damage from emotional shock if damage from physical impact alone should have been foreseen [7]; the converse would also apply. This proposition would confront the medical evidence with an impossible task of apportionment where the plaintiff's damage is of both types, and it is submitted that the result would be discreditable to any system of jurisprudence. Whereas there was during the latter part of the last century some support for the medical concept of specificity of damage, modern medical experience has shown that in most illnesses it is not possible to isolate the emotional and physical factors to the extent which would be required by the courts if the distinction were to be accepted. The courts have been prepared to recognise as actionable in negligence damage from a number of agencies such as changes of temperature,[8] intoxication,[9] infection,[10] sensitisation,[11] irradiation,[12] etc., but while factors such as physical integrity and areas of potential risk will vary in each case, the substantive requirement of foresight of personal damage is common to all.[13] It seems unreasonable to erect a special tort in the case of emotional shock. It is true that it is not, apparently, possible to bring an action in trespass for intentionally caused emotional shock, but it appears that even this distinction will have to be reviewed in the light of recent work on the historical development of trespass.[14]

Any general observations on a subject as complex as the causation of damage from emotional shock would not be accurate without endless qualifications. Since the purpose of this article is to extract the information relevant to legal requirements, no qualification

[7] A proposition which is strongly disapproved of by Singleton and Denning L.JJ. in *King* v. *Phillips* [1953] 1 Q.B. 437, 440. See also Donovan J. in *Dooley* v. *Cammell Laird & Co.* [1951] 1 Lloyd's Rep. 271. The distinction is not recognised by the American *Restatement of Torts*, Vol. 1, s. 17, and was resisted by Winfield, *Textbook of the Law of Tort*, 5th ed., 38.

[8] *Coyle* v. *John Watson Ltd.* [1915] A.C. 1 (cold air causing pneumonia).

[9] *Donoghue* v. *Stevenson* [1932] A.C. 562.

[10] *Brintons* v. *Turvey* [1905] A.C. 230 (anthrax).

[11] *Grant* v. *Australian Knitting Mills Ltd.* [1936] A.C. 85 (dermatitis).

[12] Ultrasonic damage and future hazards of the atomic age; see *Nova Mink* v. *Trans Canada Airlines* [1951] 2 D.L.R. 241.

[13] See *Carmarthenshire County Council* v. *Lewis* [1955] A.C. 549, especially Lord Reid's speech, pp. 562–567, from which the commentator in (1955) 71 L.Q.R. 162 concludes: " ' The area of potential risk ' is therefore coterminous with foreseeability and neither limits nor extends the field of liability."

[14] " The new theory regards trespass *vi et armis* not as the ancestor of trespass, but as a distinguished member of the same generation; they were all just actions in tort, and there was no special magic about those redressing forcible injuries "; Milsom [1955] C.L.J. 107.

will be given which is not essential to that purpose. The human nervous system consists essentially of two parts which are anatomically and physiologically distinct. They are the central nervous system and the autonomic nervous system. It is with the autonomic system with which we are chiefly concerned. This system operates largely independently of the volition on the "involuntary" muscles of certain structures such as the urinary bladder, gut, heart, and blood vessels. It is the vestige of the primitive nervous system of lower animal life, and gives rise to appreciable subjective physical sensations in healthy persons only in times of crisis. These sensations include frequency in passing water, looseness of the bowels and palpitations, which we have all experienced on certain occasions such as the period before an examination or a football match. These symptoms are harmless in a normal individual and are due to an emotional discharge through the autonomic system. Where, however, some physical predisposition to damage is present, such as arteries narrowed by disease, weakness of the heart wall, or perhaps a pregnant uterus, a moderately severe discharge may cause incapacitating illness or even death, as, for example, from coronary thrombosis,[15] cerebral haemorrhage or miscarriage.[16] The factor which initiates a discharge through this system is predominately fear,[17] and fear may be of many kinds. It may be for one's own personal safety, or for the safety of another; it may be for the loss of a loved object, or even an abstract ideal such as honour, reputation, or a political

[15] Jarvinen (1955) B.M.J. (i) 318 discussed the incidence of death in sufferers from coronary thrombosis following ward rounds. This is attributable to fear and anxiety as to what the doctor may decide as a result of his examination.

[16] Baudelocque reported that he saw 92 cases of abortion following the explosion of a powder tower. For other reports, see *Emotions and Bodily Changes*, Columbia Univ.Press (1947), pp. 345 *et seq.* But it is dangerous to assess the expectancy of abortion following emotional shock without taking into consideration also the proportion of pregnancies which abort in any case. This is conservatively estimated at ten per cent., though an accurate figure is not obtainable owing to the fact that the majority occur in early pregnancy when medical aid is not necessarily sought. Hertig and Sheldon, working in Boston, Mass. analysed a thousand cases of abortion, selected for reliability of clinical history and completeness of pathological material. Only one case could be shown to have been due to external trauma and/or emotional shock, while careful pathological and embryological examination of the remaining eleven cases giving a definite history of antecedent trauma or shock showed that in each case the abortion was due to inherent defects of the ovum or placenta, the antecedent trauma or shock being purely coincidental. Impressed by these findings, they questioned seven Boston consultants with a combined obstetrical experience of 157 years and found that they could recollect only six bona-fide cases of abortion due to shock or trauma between them (117 Ann.Surg. (1943) 596 *et seq.*). These findings provide an interesting comparison with the views of some lawyers as to the expectancy of damage from emotional shock (see *e.g.*, Professor Goodhart, n. 13, *infra*).

[17] Anger is also a factor, but not normally damaging. Anxiety may be damaging and its distinction from fear is highly complex. Fortunately the distinction is not essential to this analysis, as the situations in which either may be expected to occur are similar. For a good account of the causation of fear, see Gringer and Spiegel, *Men under Stress* (Churchill (1946)), 120 *et seq.*

creed. The common denominator of fear is always the threat of loss or damage to something which is highly prized, dearly loved, and to which the person is deeply attached. It has been shown, however, that extreme fear [18] is appropriate, *i.e.*, is normally found, only in situations where the individual's own life is in immediate danger,[19] one reason for this being that the very excessive discharge which it initiates is directed solely towards protecting him from immediate danger to his own personal safety. This discharge produces profound and characteristic physiological changes; blood is directed from the less essential parts of the body to organs such as the heart, muscles and brain, which are essential to meet the emergency, while at the same time the blood vessels of the skin are constricted to guard against excessive bleeding from possible wounding.[20]

The consensus of modern medical opinion is that lasting damage does not occur in "normal" individuals as a result of emotional shock, however severe.[1] Where such damage does occur, it would be attributed to quantitatively or qualitatively inappropriate reactions to a situation,[2] or to the effect of a normal reaction on some physical predisposition to damage from emotional shock, such as has already been described. Commonly it would be ascribed to a mixture of these factors. The law is not, however, concerned with the normal individual of medical standards, but with the normal "man in the street," and it is with respect to his reactions that the criterion of reasonable foresight of damage from emotional shock must be fixed.[3]

Two facts emerge from this short analysis of causation. The first is that when a plaintiff has suffered damage from emotional shock it is not justifiable to regard her damage as due to fear for someone (or something) else if she has in fact been placed in fear for her own personal safety. The overwhelming physiological response characteristic of situations involving immediate fear for

[18] The term "extreme" hardly conveys the superlative quality of the fear here considered.

[19] "As might be expected, situations actually or threateningly inimical to the bodily self, which stir up the powerful instinct of self preservation, particularly make demands upon emotional responsiveness": Milici (1939) 13 Psychiat. Quat. 278.

[20] This response has been named the "alarm reaction," Selye (1936) 138 *Nature*, Lond. 32.

[1] "Further there is a high degree of probability that some cases of diseases . . . are precipitated, aggravated, or perpetuated by emotion. There is, however, no evidence to support the view that emotion can initiate organic disease": Fraser Steele (1955) 175 *Practitioner* 129. Similarly with psychic damage; "Emotional shock, however violent, does not of itself suffice to produce prolonged psychosis. Regardless of the intensity of the emotional disturbances the normal individual sooner or later regains normality": Milici, *op. cit.* Where damage does occur, it is attributed to an abnormal response to life situations. See also Palmer (1954) 4 J.Forens.Med. 225 and Muller (1955) 43 Dtsch.Z.gerichtl.Med. 32.

[2] See Wolff (1954) *Stress and Disease*, Thomas, Springfield, Illinois 150.

[3] See pp. 496, 497, *infra*.

self is more likely to have caused the damage. Unfortunately the plaintiff's own opinion as to the cause of her damage from shock is usually unreliable, and it is easy for counsel to extract from her in cross examination "admissions" that her shock was in fact due to fear for her children or some other loved object. The jury are usually ready to accept this sentimental view of the event as a right and proper conclusion, and the deception is complete. As Lord Wright said at the conclusion of his speech in *Bourhill* v. *Young*[4]: "Modern medical science may perhaps show that the nervous shock is not necessarily associated with any particular mental ideas. The worst shock may for the moment at least paralyse the mind."

The other significant fact is that the unique reaction associated with an immediate threat to life bears an obvious relation to a dictum of Kennedy J. (as he then was) in the case of *Dulieu* v. *White*.[5] Kennedy J., after conceding that a claim based on damage from emotional shock would be sustainable in negligence, said[6]: "It is not, however, to be taken that in my view every nervous shock occasioned by negligence and producing physical injury in the sufferer gives a cause of action. There is, I am inclined to think, one limitation. The shock, where it operates through the mind, must be a shock which arises from a reasonable fear of immediate personal injury to oneself." This dictum, which later became known as Kennedy J.'s limitation, has been considered in almost every subsequent shock case, and it is important, therefore, to ascertain exactly where Kennedy J. intended the limitation to apply in terms of the modern concept of liability in negligence. There are two views on this. The first view regards the limitation as intended to apply at duty level,[7] and that Kennedy J. arrived at the limitation in a genuine attempt to assess when damage from emotional shock could reasonably be foreseen. This is a reasonable assumption as *Dulieu* v. *White* was the first case to allow recovery for nervous shock caused inadvertently, and it might have been expected that the court would have given some indication when such damage might reasonably be foreseen. On this view the duty would depend on reasonable foresight that the plaintiff would be placed in immediate fear for self. The second view regards the limitation as intended to be applied at remoteness level. On this view damage from emotional shock would never be recoverable unless it had in fact been due to immediate fear for

4 [1943] A.C. 92 at p. 112.

5 [1901] 2 K.B. 669. Plaintiff barmaid suffered nervous shock at the sight of the defendant's van and horses being driven into the bar.

6 At p. 675.

7 See Sargant L.J. in *Hambrook* v. *Stokes* [1925] 1 K.B. 141 at p. 162, cited by Lord Porter in *Bourhill* v. *Young* (*supra*, note 4) at pp. 115, 116: Lord Murray in *Currie* v. *Wardrup*, 1927 S.C. 538 at p. 555, Lord Thankerton in *Bourhill* v. *Young* (*supra*, note 4) at p. 99.

self.[8] A careful reading of Kennedy J.'s judgment will show beyond reasonable doubt that he intended the limitation to apply primarily at duty level. Immediately after making the limitation he continued as follows: "A has, I conceive, no legal duty not to shock B's nerves by the exhibition of negligence towards C, or towards the property of B or C. The limitation was applied by Bruce and Wright JJ. in the unreported case of *Smith* v. *Johnson & Co.* referred to by Wright J. at the close of his judgment in *Wilkinson* v. *Downtown*. In *Smith* v. *Johnson & Co.* a man was killed by the defendant's negligence in the sight of the plaintiff, and the plaintiff became ill, not from the shock produced by fear of harm to himself, but from the shock of seeing another person killed. The court held that this harm was too remote a consequence of the negligence. I should myself, as I have already indicated, have been inclined to go a step further, and to hold upon the facts in *Smith* v. *Johnson & Co.* that, as the defendant neither intended to affect the plaintiff injuriously, nor did anything which could reasonably or naturally be expected to affect the plaintiff injuriously, there was no evidence of any breach of legal duty towards the plaintiff or, in regard to him, of that absence of care according to the circumstances by which Willes J. in *Vaughan* v. *Taff Ry. Co.* defines negligence." The distinction between the case he was considering and *Smith* v. *Johnson & Co.* was at duty level. No duty was owed in that case as it could not have reasonably been foreseen that the plaintiff would be placed in immediate fear for self, or subjected to any other damaging agency. On the other hand a duty was owed in *Dulieu* v. *White* as, quite apart from the possibility of damage to the plaintiff from physical impact, it should reasonably have been foreseen that she would be placed in immediate fear for self, which, in Kennedy J.'s view, was a potentially damaging emotional situation. But he continued a little later: "In order to illustrate my meaning in the concrete, I say that I should not be prepared in the present case to hold that the plaintiff was entitled to maintain this action if the nervous shock was produced, not by fear of bodily injury to herself, but by horror or vexation arising from the sight of mischief being threatened or done either to some other person, or to her own or her husband's property, by the intrusion of the defendant's van and horses. The cause of the nervous shock is one of the things which the jury will have to determine at the trial." This passage seems to suggest that the limitation is applicable at remoteness level. However, the position becomes clearer when it is remembered that in 1901 foreseeability was in some respects still the test of remoteness. Whereas it was not necessary that the extent of the damage should be foreseen, the generally accepted

[8] See Atkin L.J. in *Hambrook* v. *Stokes* at p. 157, Goodhart (1953) 16 M.L.R. 17 and Lord Macmillan in *Bourhill* v. *Young* (*supra*, note 4) at p. 105.

view is that the nature, character or type of damage had to be foreseeable.[9] In Kennedy J.'s view it could not reasonably be foreseen that damage should result from fear for someone else, and damage of such a character was therefore too remote a consequence of the negligence. Under the circumstances the result would be the same at whichever level the limitation was applied, and it is, therefore, all the more significant that Kennedy J. should have emphasised that the limitation is concerned primarily with the question of duty. It is the failure to appreciate this point which has led to much of the uncharitable reception given to the limitation in subsequent cases. Later in his judgment Kennedy J. was careful to point out that recovery was not restricted to the extent of the foreseeable damage when he considered the effect of immediate fear for self on the plaintiff's unforeseeable pregnancy.[10]

The danger of attributing damage as due to fear for someone else when the plaintiff has been placed in immediate fear for self does not appear to have occurred to Kennedy J. It is probable that the prospect of such discrimination would not have seemed unreasonable under the existing state of the medical knowledge on the subject at that time. Nevertheless, a case was decided within two years of the decision in *Dulieu* v. *White* which might have raised at least some suspicions on the point if it had been officially reported. As it was, the case in question, *Richard and Wife* v. *Plymouth Co-operative Society*,[11] passed unnoticed in subsequent cases. The facts were as follows: a woman, fearing that her house was in danger of collapsing as a result of adjacent excavations by the defendants, went out to seek the advice of some friends, meanwhile leaving her children in the house. As she was returning to the house one side of it collapsed and she narrowly escaped being struck by falling masonry. In the meantime, and unknown to her, the children had been moved to safety. The defence, following a line which was to become almost inevitable in later cases, suggested that the shock which she had suffered in the accident was in fact due to fear for her children, and, therefore, too remote a consequence of the negligence. Bigham J. directed the jury to decide whether the woman's shock was due to fear for—

(1) her own safety,

(2) her children's safety,

(3) her own and her children's safety.

The jury found for the third alternative, whereupon the judge sent them back to apportion the damage on the basis that she could

[9] This was the substance of the argument of the defendant's junior counsel (later Lord Porter) in *Re Polemis* [1921] 3 K.B. 560, who subsequently considered that the court were right in rejecting it; (1934) 5 C.L.J. 176. See also Lord Wright (who was senior counsel for the defendants) in (1951) 14 M.L.R. 393, and Goodhart (1951) 68 L.Q.R. 514 *et seq.*

[10] At p. 679.

[11] (1903) Devon Assizes; *The Times*, February 4, 1903.

not recover for damage due to shock from fear for her children. They achieved this remarkable feat with an award of £250. The rule in *Re Polemis* was to provide a satisfactory way out of this kind of difficulty, since it showed that it was not necessary that the nature, character or type of damage should be foreseeable.[12] However, as will be seen, the courts have been reluctant to give full effect to the rule in the shock cases.

The critical case for Kennedy J.'s limitation was *Hambrook* v. *Stokes Brothers*,[13] and the facts of this controversial case require further examination in the light of the conclusions reached in this article. The defendant's lorry had been left with its engine running at the top of a hill and facing down a narrow street which included a bend towards the bottom of the incline. Not long after the plaintiff had seen her children disappear round this corner on their way up the hill to school she saw the lorry, which was out of control and swaying from one side of the street to the other, careering round the corner towards her. It was stopped before it could reach her as a result of a collision with a building on the same side of the street and not far from where she was standing. This fact enables commentators to state that she was not in fact in personal danger. Mrs. Hambrook, however, was not to know that the lorry would collide with a building before it could reach her, and the facts suggest that she had every reason to be in immediate fear for her own personal safety, and that this situation could have been foreseen. She was, of course, afraid for her children, and she immediately went round the corner, where some bystanders told her that a little girl wearing spectacles and answering to her own daughter's description had been injured by the lorry. This information provoked a hysterical attack. Later she went to the school, where she found her daughter missing, and finally to the hospital, where she found the child seriously injured. Mrs. Hambrook, who was pregnant at the time, suffered a haemorrhage and eventually died as a result of the shock. The following points are relevant—

(1) Negligence was admitted by the defendants, though in any case breach of duty to Mrs. Hambrook was shown by foresight of damage to her from (i) physical impact, (ii) being placed in immediate fear for self (and therefore within Kennedy J.'s limitation).

(2) *Re Polemis* had been decided some years previously, with the result that recovery was no longer restricted to damage of a character which could have been foreseen.

Branson J., who was the trial judge, directed the jury to answer the question "Was the death of the wife the result of shock

[12] Discussion of the rule is beyond the scope of this article: Asquith L.J. reviews the authorities in *Thorogood* v. *Van den Berghs and Jurgens* [1951] 2 K.B. 537 at pp. 551 *et seq*. The literature on the rule is extensive.

[13] [1925] 1 K.B. 141.

produced by fear of harm to herself?" The jury decided that it was not, and the judge ruled that Mrs. Hambrook's representatives were disentitled to recover. There could have been only two reasons for Branson J.'s ruling. First, that he applied Kennedy J.'s limitation as was intended at duty level, but was restricting recovery to damage of a character which could be foreseen (*i.e.*, that resulting from immediate fear for self); this would, of course, have been contrary to the rule in *Re Polemis*. Secondly, that he was prepared to follow the rule in *Re Polemis* to the extent of allowing recovery for directly consequential damage of an unforeseeable character, but imposed the limitation at remoteness level by refusing to allow recovery unless Mrs. Hambrook's damage from shock had in fact been due to her immediate fear for her own personal safety. On either interpretation it was necessary for the jury to consider whether damage from shock to a woman who had been placed in immediate fear for her own life could be attributed to fear for her children.

An appeal was taken against Branson J.'s finding that the defendants were not liable for damage due to fear for her children, and the Court of Appeal overruled him by a majority of two to one. Fortunately both Bankes and Atkin L.JJ., who constituted the majority, approved the rule in *Re Polemis*, and no allowance has to be made on that account in considering the reasoning whereby Kennedy J.'s limitation was overruled. This should have left the question entirely as one of the remoteness of the damage. Atkin L.J. made this quite clear when he said [14]: "I am clearly of the opinion that the breach of duty to her is admitted in the pleadings." Later he said [15]: "No doubt the particular injury was not contemplated by the defendants, but it is plain from *Polemis* v. *Furness Withy and Co. Limited* that this is immaterial." Atkin L.J.'s judgment is therefore authority for the view that the limitation is not applicable at remoteness level and he cannot be taken as overruling the limitation at duty level. It is true that he also considered the limitation at duty level, indicating that he would be prepared to overrule it at that level also, but his remarks in that respect were, on his own admission, strictly *obiter*.

If the limitation is considered at remoteness level, it will be realised that it does not apply in the cases where shock is intentionally produced. Clearly there can be no justification for discrepancy between the "intentional" and the "unintentional" cases at remoteness level, and Atkin L.J. was able to cite the "intentional" cases [16] against the limitation with considerable

[14] At p. 156. [15] At p. 157.

[16] *Wilkinson* v. *Downtown* [1897] 2 Q.B. 57, *Janvier* v. *Sweeney* [1919] 2 K.B. 316: Atkin L.J. also cited *Pugh* v. *London, Brighton & South Coast Railway* [1896] 2 Q.B. 248 against the limitation, a case which Sargant L.J. pointed out "is merely a decision on what amounted to an accident within the meaning of a policy" (at p. 164).

effect. On the other hand, if the limitation is applied as Kennedy J. intended, from the standpoint of the existence of a duty of care, there is no such difficulty as foresight of damage should be irrelevant to the intentional cases, which are best regarded as analogous to trespass.[17] If A deliberately strikes B intending to do no more than to hurt her, and she suffers damage as a result of some peculiar susceptibility to injury from slight blows, it will not avail A to show that no damage could reasonably be foreseen as a result of his intentional act. Similarly, if A deliberately shocks B intending to do no more than to terrify her, and she suffers damage as a result of some peculiar susceptibility to damage from emotional shock, the same principle should apply. The limitation, being concerned solely with the question of reasonable foresight of damage from emotional shock does not apply.

On the other hand Bankes L.J. treated the case entirely as one of the existence of a duty of care, depending in the circumstances on foresight of damage from emotional shock. As he approved the rule in *Re Polemis*, it is difficult to justify this approach unless it is assumed that he regarded nervous shock as a separate tort; even so it should have been unnecessary to have overruled Kennedy J.'s limitation as it could have been foreseen that Mrs. Hambrook would be placed in immediate fear for her own personal safety. He proceeded as follows [18]:

"Upon the authorities as they stand, the defendant ought to have anticipated that if his lorry ran away down this narrow street, it might terrify some woman to such an extent, through fear of some immediate bodily injury to herself, that she would receive such a mental shock as would injure her health. Can any real distinction be drawn from the point of view of what the defendant ought to have anticipated, and what, therefore his duty was, between that case and the case of a woman whose fear is for her child, and not for herself? Take a case in point as a test. Assume two mothers crossing this street at the time when this lorry comes thundering down, each holding a small child by the hand. One mother is courageous and devoted to her child. She is terrified, but thinks only of damage to the child, and not at all about herself. The other woman is timid and lacking in motherly instinct. She is also terrified, but thinks only of the damage to herself and not at all about her child. The health of both mothers is seriously affected by the mental shock occasioned by the fright. Can any real distinction be drawn between the two cases? Will the law recognise a cause of action in the case of the less deserving mother, and none in the case of the more deserving mother. Does

[17] See p. 480 (*supra*). It seems that these actions are brought as actions for personal injuries in order to save deciding whether they fall under trespass or case.

[18] At p. 151.

the law say that the defendant ought reasonably to have anticipated the non-natural feeling of the timid mother, and not the natural feeling of the courageous mother? I think not."

With all respect it must be pointed out that this reasoning provides no argument against the limitation at duty level since it should reasonably have been foreseen that both mothers would be placed in immediate fear for their personal safety. It would, in any case, be impossible to attribute the "courageous" mother's damage to fear for her child, unless it was assumed that she was entirely lacking in the normal instinctive and automatic emotional reaction to an immediate threat to her own life: a proposition which is medically unsound and based largely on sentiment.

The favourable reception accorded in subsequent cases to the dissenting judgment of Sargant L.J.[19] makes it important to see where and how he dissented from the majority view. He alone emphasised that Kennedy J.'s limitation applied at duty level, and he alone refused to overrule it, supporting this decision with the most convincing argument that has yet been put in favour of retaining the limitation. But beyond this point his judgment becomes extremely hard to follow as he reaches the conclusion that no duty existed towards Mrs. Hambrook; a proposition which can be justified only by discounting the possibility of foresight of damage to her from both physical impact and immediate fear for self, not to mention the admission of negligence in the pleadings to which he does not refer. His treatment of the co-existence of her fear for her children and for herself is entirely unconvincing, and he said of the type of example employed by Bankes L.J. (*supra*): "Here there is, as the evidence has been given, little risk of such confusion, since there is no evidence that Mrs. Hambrook was, or considered herself to be, in any personal danger, and the inference which Sergeant Sullivan asked the court to draw was that the shock was due to Mrs. Hambrook's acute apprehension of the danger to one or more of her children."[20] But, he had already said earlier in his judgment[1]: "Her state was no doubt due to shock arising from one or other aspect of the accident; but the evidence given did not indicate with absolute certainty whether the shock was due (1) to apprehension of immediate injury to herself from the lorry, though her exclamations seem to negative this view, or (2) from apprehension of injury having been caused by the lorry to one of her children." It is difficult to see why the natural and expected exclamations of concern for her children should be allowed to detract from the damaging effect of a situation

[19] At p. 159. See Lord Murray in *Currie* v. *Wardrup*, 1927 S.C. 538 at p. 555; Lord Russell of Killowen in *Bourhill* v. *Young* (*supra*, note 4) at p. 103: "I prefer the dissenting judgment of Sargant L.J. in *Hambrook* v. *Stokes*"; also Lord Macmillan at p. 105, Wickhem J. in *Waube* v. *Warrington* (1935) 258 N.W.Rep. 497 at p. 500.

[20] At p. 164.

[1] At p. 160.

in which she had been placed in immediate fear for her life. It is easy to see the line that cross examination might have taken if Mrs. Hambrook had survived to face it, as no mother would have denied that she was afraid for her children and the jury would have seen no reason to depart from their sentimental verdict.

Similar considerations arose in the Scottish case of *Currie* v. *Wardrup* [2] which was decided a few years later. The pursuer and her fiancé were out walking together when they were run down by a bus. The fiancé was seriously injured, but the pursuer, although knocked over, suffered damage only from nervous shock.[3] The defence, which had managed to extract some admissions from the pursuer that her shock was due to fear for her fiancé, invited the trial judge, Lord Murray, to put the matter to the jury. Lord Murray felt himself obliged to accept their invitation, and directed the jury to decide whether the pursuer's shock was due to: (1) fear for her fiancé, or (2) fear wholly or in part for herself. He was, however, careful to point out to the jury that the question was quite immaterial, as there had been a breach of duty to the pursuer and she would recover all her damage on either count. The jury found for the second alternative, and on a Bill of exceptions to his direction Lord Murray refused to ask the jury to discriminate between the damage due to fear for her fiancé and fear for herself. On appeal the Court of Session upheld Lord Murray by a majority of three to two. Of the majority, Lord Anderson and Lord Hunter thought that Lord Murray had shown altogether too much patience with the defence's proposition, and that the question should never have been put to the jury in the first place. Lord Anderson said [4]: "It is doubtful if the most eminent Harley Street specialist could answer the questions which were put to the jury. These questions, I say again, should never have been put." Lord Hunter said [5]: "It is really for a metaphysician and not for a juryman to distinguish between the two kinds of damage." The dissenting judges [6] placed great weight on the admission of the pursuer that her shock was due to fear for her fiancé, of which Lord Anderson said [7]: "She chose to introduce an irrelevant topic as to what she had experienced because of what was happening to a friend. That is the root of the whole trouble."

Lord Murray, in his judgment on the appeal, made an important observation on Kennedy J.'s limitation. He said [8]: "It is to be observed that in *Dulieu's* case, the limitation suggested by Kennedy J. (disapproved of by the majority of the judges in *Hambrook's* case) is expressly based on the view that in

[2] 1927 S.C. 538.
[3] Tachycardia (rapid heart action) and tremors.
[4] At p. 551.
[5] At p. 549.
[6] Lord Justice Clerk Allness and Lord Ormidale.
[7] At p. 552.
[8] At p. 555.

the case figured no duty to take care would arise, as also, in his view, was the case of *Smith* v. *Johnson* there referred to." It is clear that Lord Murray did not regard the limitation as applicable at remoteness level. The American courts seem to hold similar views on this aspect of the shock cases, as is shown by the case of *Bowman* v. *Williams*[9] which is in many respects similar to the *Hambrook* case. A man, looking out of his window, saw an uncontrolled lorry coming straight for his house. It plunged into the basement, where he knew his children were playing, and caused substantial structural damage. The defence adopted the usual line of trying to show that the shock[10] which he received was due to fear for his children and his property. Parke J., however, refused to be drawn, and said[11]: "There was no basis to differentiate the fear caused for himself and his children because there is no possibility of division of an emotion which was instantly evoked by the common and simultaneous danger of the three." In a recent Canadian case, *Horne* v. *New Glasgow*,[12] a lorry went out of control while going down a hill and crashed into a house at an estimated speed of sixty m.p.h., coming to rest within a few feet of the lady occupant who was in the living room. She escaped damage from physical impact, but suffered nervous shock,[13] admitting that she was extremely worried about the fate of her house and of her aged parents who were in a room upstairs at the time of the accident. McQuarrie J., allowing her to recover, decided that her shock was due to the accident "causing her to believe that her home was destroyed, and no doubt to fear instinctively for her own safety and the safety of her parents."[14] It appears that little importance was attached to the plaintiff's immediate fear for her own life, which was potentially the most damaging emotion of all.[15]

Difficult questions may be raised in the cases where it is not clear whether the possibility of damage from physical impact might have

[9] (1933) 164 Md. 397, 165 Atl. 182, Maryland Court of Appeals.
[10] Hysteria.
[11] 164 Md. 403, 165 Atl. 184.
[12] (1954) 1 D.L.R. 832, Supreme Court of Nova Scotia.
[13] Abdominal pain, sleeplessness, and nightmares.
[14] At p. 838.
[15] This raises the further question of whether the court would be prepared to hold that a duty existed not to cause damage from shock to a plaintiff by damaging property. In *Rasmussen* v. *Benson* (1938) 280 N.W.Rep. 890, the Supreme Court of Nebraska, by a majority of four to two, allowed a dairy farmer to recover for nervous shock (cardiac decompensation leading to death) resulting from his herd being poisoned by bran contaminated with arsenic. His shock was also considered to have been due to fear for his customers who had consumed the milk from his cows. The possibility of foresight of damage to him from consuming the milk himself was not considered by the court. The majority place great weight on two previous decisions, *Hanford* v. *Omaha Street Ry. Co.* (1925) 203 N.W. 643 (woman narrowly missed injury in collision between two street cars) and *Netusil* v. *Novak* (1931) 235 N.W. 335 (woman attacked by vicious dog), in both of which, as the dissenting judges pointed out, the plaintiffs were in immediate fear for their personal safeties.

been foreseen. One such case was *Bourhill* v. *Young*,[16] in which the pursuer, an Edinburgh fishwife, suffered a miscarriage as a result of hearing the noise of an accident, and later seeing a pool of blood in the road. She was about sixty feet away from a collision which had taken place between a motor bicycle and a car. A tram, from which she had just alighted, was between her and the accident. The House of Lords treated the case entirely as one of the existence of a duty of care, depending in the circumstances on the possibility of foresight of damage from emotional shock. Their lordships did not consider the possibility of damage from physical impact could reasonably have been foreseen; nevertheless, as Denning L.J. has pointed out in a recent case, the fishwife would have been entitled to recover if by some freak chance she had been struck.[17] It would, of course, have been a very different kind of accident for this to have happened, and the question raises very difficult metaphysical problems as to the situation of the hypothetical reasonable observer in time and space. The accident between the two vehicles was agreed to have been the fault of the cyclist, but it was pointed out in the House of Lords that although he was driving his cycle at an excessive speed, it was nevertheless under control and there could be no possibility of a person in the pursuer's position being in danger from physical impact. From the point of view of the analysis in this article, there was, in the circumstances, no reasonable foresight that the pursuer would be placed in immediate fear for her own personal safety, and it is important to note in this respect that the learned Lords expressly left themselves free to pronounce finally on Kennedy J.'s limitation.[18] One feature of this case was that the previous decision of the Court of Appeal in *Owens* v. *Liverpool Corporation*[19] was disapproved of by three of the learned Lords who referred to it.[20] In that case a tramcar negligently collided with a hearse so that its glass side was broken and the coffin appeared in danger of falling off into the road. The plaintiffs, who were following behind the hearse as mourners in a car, suffered nervous shock as a result of the sight of the coffin's precarious

[16] [1943] A.C. 92.

[17] *King* v. *Phillips* [1953] 1 Q.B. 429 at p. 439. See also the remarkable statement in Clerk and Lindsell on *Torts*, 10th ed., 349: "It is submitted that in so far as *Bourhill* v. *Young* (a Scots appeal) decided that Young owed no duty of care to the fishwife, it was wrongly decided according to English law." Supporters of this view will find it difficult to explain the treatment of the case by the House of Lords in *Carmarthenshire County Council* v. *Lewis* [1955] A.C. 549 (an English appeal).

[18] Lord Russell of Killowen preferred Sargant L.J.'s dissenting judgment in *Hambrook* v. *Stokes*, Lord Macmillan (at p. 105) reserved his opinion on the limitation, Lord Wright (at p. 112) would express no final opinion on it. Lord Thankerton thought that there might be cases where the limitation would not apply (at p. 99).

[19] [1939] 1 K.B. 394.

[20] Lord Thankerton at p. 100, Lord Macmillan at p. 105, Lord Wright at p. 110.

position. The trial judge held them disentitled to recover on the ground that there had been no sight or apprehension of damage to a human being, this requirement apparently being regarded as the *ratio decidendi* of the *Hambrook* case. The Court of Appeal reversed his decision and appeared to treat the case entirely as one of remoteness of damage, MacKinnon L.J. (who delivered the judgment of the court) implying that the court would have been prepared to allow recovery if the shock had been due to apprehension for "the life of a beloved dog." [1] It is not clear at what point negligence was established towards the plaintiffs in this case. It was not considered whether damage from physical impact could reasonably have been foreseen,[2] nor was it considered whether the plaintiffs might reasonably be expected to have been placed in immediate fear for their own personal safeties. On the facts, only one of them was in a position to know that an accident was taking place; the remainder saw only the aftermath, *i.e.*, the precarious position of the coffin. It may be that negligence towards the hearse was considered sufficient to found culpability towards the plaintiffs, but this could be supported only by an abstract view of negligence and would be against the great weight of authority.

There remain those cases where the victim could not, by any stretch of the imagination have been placed in any personal danger. The American case of *Waube* v. *Warrington* [3] provides a good example. A woman standing at the window of her house suffered nervous shock and died as a result of seeing her child run over and killed by a motorist. Wickhem J., delivering the judgment of the Supreme Court of Wisconsin, held her representatives disentitled to recover. He said [4]: "The problem must be approached from the outset from the viewpoint of the duty of the defendant and the right of the plaintiff, and not from the viewpoint of proximate cause." He made a passing reference to the *Hambrook* case in which he preferred the judgment of Sargant L.J., and said [5]: "With due deference to the learned judges who concurred in the decision, we cannot escape the conclusion that the determination in the *Hambrook* case is incorrect both in its initial approach and its conclusions."

The facts of *Waube* v. *Warrington* are indistinguishable in principle from the recent English case of *King* v. *Phillips*.[6] A taxi driver backed his cab, without looking, on to a child's tricycle, slightly injuring the child. The child's mother, who was in a house about sixty yards down a side street, heard her child scream, and, looking out of the window, saw the taxi slowly backing over the

[1] At p. 399.
[2] Though Singleton and Denning L.JJ. seem to have thought so when they considered the case in *King* v. *Phillips* [1953] 1 Q.B. 429, at pp. 436, 439.
[3] (1935) 258 N.W.Rep. 497, Supreme Court of Wisconsin.
[4] At p. 497.
[5] At p. 500.
[6] [1953] 1 Q.B. 429.

tricycle. She could not see the child, and she immediately ran downstairs and into the street where she met the child running towards her. She suffered nervous shock as a result of her experience, and McNair J., the trial judge, held her disentitled to recover as she was outside the area of potential danger, and there was therefore no breach of duty towards her. The Court of Appeal upheld the decision, but a different reason for the decision was given by each Lord Justice. The essential question should have been whether it could reasonably be foreseen that a mother would suffer nervous shock as a result of immediate fear for her child's safety. Singleton and Hodson L.JJ. held that no duty existed; Hodson L.J.[7] on the ground that the case was outside Kennedy J.'s limitation, Singleton L.J.[8] on the ground that the woman was so far away from the accident that she could not reasonably be expected to be within the contemplation of the taxi driver. If it is to be admitted that a woman can reasonably be expected to suffer nervous shock as a result of apprehension for the safety of her child (and Singleton L.J. seems to admit this), it is difficult to see how her distance from the accident can qualify this foresight, providing she is in a position to appreciate the nature and quality of the immediate threat to her child. Denning L.J.[9] held that a duty did exist under the circumstances, but that the damage was too remote a consequence of the negligence as a taxi driver could not reasonably be expected to have foreseen that the slow backing of his cab would terrify a mother seventy yards away. He distinguished the *Hambrook* case on the ground that the lorry driver ought to have foreseen that a runaway lorry might seriously shock the mother of children in the danger area. Again it is difficult to see the justification for this distinction in foresight, as in either case it is the potentially damaging effect of immediate fear for the child which is in issue, and this would be the same in each case. The conclusion to be reached from this case is that the court was unwilling to face squarely the question of reasonable foresight of damage from emotional shock.

Conclusions

The modern concept of liability in negligence has resulted in a shift of emphasis from remoteness level to duty level, as it has become appreciated that the test of foreseeability of risk affords the only practical solution to the causation problem.[10] The need

[7] At p. 443.
[8] At p. 437.
[9] At p. 442.
[10] "I believe that a proper appreciation of the orbit of duty aspect of negligence law, and a proper appreciation of the hazard element of negligence law, will very largely solve 80 per cent. of the causation cases, or 80 per cent. of the cases where the court talks causation"; Eldridge, *Modern Tort Problems* 24. See also Flemming (1954) 1 Sydney L.J. 283; Morrison (1948) 11 M.L.R. 9 *et seq.*

for this approach in cases of nervous shock was appreciated as early as *Dulieu* v. *White*, the first case to allow recovery for nervous shock caused inadvertently, when both Kennedy and Phillimore JJ. emphasised that the essential question was one of the existence of a duty of care.[11] Kennedy J. limited this duty to cases where it should have been foreseen that the plaintiff would be placed in immediate fear for self. A review of subsequent cases has shown that the courts have not always appreciated the need for this approach, but have preferred to impose Kennedy J.'s limitation, contrary to his intention, at remoteness level by allowing recovery only where the plaintiff's damage has in fact resulted from her immediate fear for herself. This approach has necessitated the difficult and often impossible task of assessing which particular emotional impact has caused the damage.[12] The medical implications of such an investigation has been discussed and it has been suggested that the result is often contrary to probable scientific truth. It has been pointed out that the rule in *Re Polemis*, which extends liability in negligence beyond damage of a foreseeable character, renders unnecessary such investigations, which are discreditable to our system of jurisprudence. It has also been shown that it is impracticable to regard preservation from nervous shock as a distinct interest, and that the threatened emergence of nervous shock as a separate tort is based on an incorrect concept of causation.

In conclusion, it is submitted that the outstanding problem in the shock cases is the criterion of reasonable foresight of damage from emotional shock, the solution of which is delayed by the uncertain position of susceptible persons at duty level. It will be

[11] "The difficulty in these cases, is to my mind, not one as to the remoteness of the damage, but as to the uncertainty of there being any duty"; Phillimore J. at p. 685.

[12] This investigation was very nearly fatal to the plaintiff's representations in the *Hambrook* case. Once the possibility of Mrs. Hambrook's damage being due to fear for herself had been discounted, it was just as likely that her damage was due to any one of four incidents (i) fear at the time of the accident, (2) fear experienced as a result of what the bystanders told her, (3) fear at finding her child absent at the school, and (4) fear at finding her child seriously injured at the hospital. The Court of Appeal unanimously decided to send the case back to the lower court to decide whether her shock (in relation to fear for her children) was due to what she experienced with her own unaided senses at the time of the accident. Hence Magrauder, 49 Harv.L.R. (1936) 1039, who was preoccupied with this and other problems of remoteness such as the possibility of shock to a relative as a result of seeing disfigurement long after the accident, suggested that "the psychic impact must be fairly contemporaneous with the casualty." Evatt J. dealt at length with this problem in *Chester* v. *Waverley Corporation* (1939) 62 C.L.R. 1, pp. 17–51, and reached the conclusion that it is impossible to abstract any definite emotional impact responsible for the damage in such situations. These problems will continue to harass any court which deals with shock cases from the standpoint of remoteness of damage. Hence Green (1933) 27 Illinois L.R. states: "The inquiry ought to be, Did the defendant owe the plaintiff a *duty* the *violation* of which *caused* the plaintiff *damage*? If there is any weakness in a case, it will appear at one or more stages of this inquiry."

necessary to select one of two views. The first is that the defendant should foresee that super-sensitive persons may be present,[13] but it is difficult to define the extent of liability for shock under this view as the individual susceptibility to damage from shock is very much wider than is the case with physical impact. It is doubtful if it is a practicable proposition, as the price of activity, at any rate on the roads, would be too great. The second view is that the defendant is entitled to assume that the "average man in the street" is a person of reasonably normal condition.[14] Substantial authority for this view is found in the leading case of *Bourhill* v. *Young*[15] in the speeches of Lord Wright and Lord Porter.[16] It is suggested that adoption of Kennedy J.'s limitation, which has been shown to correspond with a unique potentially

[13] Hence Seavey (1951) 67 L.Q.R. 475 criticises the decision in *Bourhill* v. *Young* on the ground that: "The further reason advanced by the court, that the defendant had no reason to suppose that super-sensitive persons would be present, is of course unrealistic." Evatt J. comes out strongly in favour of the view in the *Chester* case at pp. 26–30. Goodhart, *Essays in Jurisprudence in the Common Law* (1931) 126, 127 also supports it, and leads him in (1953) 16 M.L.R. 25 to state that ". . . it is a gloomy view of human nature which suggests that the sight of death and/or injury to someone else cannot create such a shock.": indicating that he would extend foresight of damage from emotional shock to persons unrelated to the victim. Fortunately such expectancy is against all medical experience. Latham C.J. said in the *Chester* case at p. 10: "Death is not an infrequent event, and even violent and distressing deaths are not uncommon. It is, however, not a common experience of mankind that the spectacle even of sudden and distressing death of a child produces any consequence of more than a temporary nature in the case of bystanders or even close relatives who see the body after death has taken place." See also Earingey (1946) 14 Med-Leg.J.(Camb.) 17. The Court of Appeal has rejected this view in so far as persons with defective eyesight are concerned. In *Pritchard* v. *Post Office* [1950] W.N. 310, a blind man fell down a manhole which was alleged to be inadequately fenced. It was held (*per* Lord Evershed M.R.) that the defendants were not liable in negligence as they had taken the steps which they normally took, which were reasonable and proper for guarding and protecting ordinary members of the public, namely persons who could see.

[14] "The necessity of acting with reference to the average case, involved in any system of standards or rules, compels some sacrifice of the demands of the over-sensitive": Pound, 28 Harv.L.R. (1916) 365. The principle has long been recognised in English law, hence Pollock C.B. said in *Allsop* v. *Allsop* (1860) 5 H. & N. 534, at 536: "The law deals with damage which might reasonably result not that which may depend on the idiosyncrasy of party." It is assumed, of course, that no damage would otherwise be foreseeable. For a discussion of the application of this principle by American courts, see Smith and Cobb (1943) 19 Ann.Inter.Med. 895 *et seq.*

[15] *Supra*, note 16.

[16] Lord Wright deals with the matter at length (pp. 109, 110) and concludes, in so far as foresight of susceptibility is concerned, that the criterion of reasonable foresight must relate with a "reasonably normal condition, if medical evidence is capable of defining it, . . ." Lord Porter (at p. 117) thought that: "The driver of a car or vehicle even though careless, is entitled to assume that the ordinary frequenter of the streets has sufficient fortitude to endure such incidents as may from time to time be expected to occur in them, including the noise of a collision and the sight of injury to others, and is not to be considered negligent to one who does not possess the customary phlegm."

damaging emotional reaction, would be compatible with this view, and that its application, in a manner consonant with Kennedy J.'s intention, affords a rational solution to the outstanding problem of the "shock" cases.

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EQUITABLE RELIEF FOR THE PURCHASER OF HIRE-PURCHASE GOODS

ALTHOUGH the layman commonly regards a hire-purchase agreement simply as a means of buying goods without paying cash, the legal view is that a true hire-purchase agreement is not a sale of goods at all. It is a complex contract which creates a bailment of the goods and grants the hirer an option to purchase them on fulfilment of certain conditions. If, instead of granting the hirer an option to purchase, it imposes an obligation to purchase the goods it is really a sale on credit terms. The hirer is a person who has agreed to buy the goods and therefore has power under section 25 (2) of the Sale of Goods Act, 1893, to pass a good title to a purchaser in good faith, although he himself has as yet no title to the goods.[1] If, on the other hand, it is a true hire-purchase agreement, the hirer has not agreed to buy the goods and section 25 (2) will not assist a purported purchaser of the hired goods from the hirer: he will get no title to the goods.[2]

EFFECT OF BREACH OF THE AGREEMENT

Like any other bailment, the bailment of hire created by a hire-purchase agreement may be determined in accordance with its express provisions. If, for example, the agreement provides that the owner of the goods may terminate the hiring without notice if the hirer parts with the possession of the goods, the owner becomes entitled to recover possession of the goods when the hirer places them with an auctioneer for sale.[3] A bailment is also terminated by any act of the bailee inconsistent with the continuance of the bailment even though the terms of the bailment make no express provision for termination. Thus where a bailee in possession of jewels for safe custody pledged them for a loan the bailment was terminated and the pledgee liable for conversion.[4]

In the case of a hire-purchase agreement, however, termination of the bailment must be distinguished from termination of the whole transaction. "In a complex contract of this nature it by no means follows that because that part of the contract which is a contract of bailment is at an end the other part of the

[1] *Lee* v. *Butler* [1893] 2 Q.B. 318, C.A.
[2] *Helby* v. *Matthews* [1895] A.C. 471, H.L. But a purchaser from the hirer will obtain a good title if he buys the goods in market overt in accordance with s. 22 of the Sale of Goods Act, 1893: *Bishopsgate Motor Finance Corporation Ltd.* v. *Transport Brakes Ltd.* [1949] 1 K.B. 322, C.A.
[3] *North Central Wagon Co.* v. *Graham* [1950] 2 K.B. 7, C.A.
[4] *Hartop* v. *Hoare* (1743) 3 Atk. 44.

contract, which confers a proprietary interest,[5] is also at an end."[6] A purported sale or pledge of the goods by the hirer, therefore, does not necessarily give the owner the right to recover the goods. Although the bailment of hire may have terminated, the purchaser or pledgee may have some rights as against the owner of the goods even though he is not protected by section 25 (2) of the Sale of Goods Act.

This is demonstrated by *Belsize Motor Co.* v. *Cox*.[7] The hirer of a taxi-cab on hire-purchase terms from the plaintiffs pledged it with the defendant in breach of the following clause in the hire-purchase agreement: "The hirer shall not re-let, sell or part with the possession of the said motor taxi-cab . . . without the previous consent in writing of the owners or their said agents." The plaintiffs thereupon claimed the return of the cab from the defendant and damages for its detention. The defendant argued that the plaintiffs were not entitled to the return of the cab or its value but only to payment of that part of the total hire-purchase price remaining unpaid, and Channell J. upheld this contention. "A pledgee or purchaser," he said,[8] "takes such title as his pledgor or vendor has, and here, whether the pledge to the defendant was rightful or wrongful (in this case it was wrongful), yet the defendant thereby acquired such rights as the original hirer had." The original hirer had the right to purchase the cab on payment of the unpaid balance, and the defendant therefore acquired a similar right. In an action for conversion the measure of damages where the defendant has an interest in the goods is the value of the plaintiff's interest as between himself and the defendant.[9] The plaintiffs were therefore entitled to judgment for the unpaid balance and no more.

The Court of Appeal came to a similar conclusion in *Whiteley* v. *Hilt*,[10] where the hirer "sold" a piano, which she held under a hire-purchase agreement with the plaintiffs, to the incoming tenant of her flat, the defendant. It was held that the hirer had in effect assigned to the defendant the benefit of the contract creating the option to purchase the piano, so that the defendant could exercise the option. As in the earlier case, the plaintiffs were entitled to the unpaid balance of the hire-purchase price and not to the return of the goods.

Assignability of Hirer's Rights

The hirer, then, although he cannot pass a good title to the goods to a purported purchaser, may be able to assign to him the

[5] *i.e.*, the option to purchase the goods.
[6] Warrington L.J., *Whiteley* v. *Hilt* [1918] 2 K.B. 808 at p. 822.
[7] [1914] 1 K.B. 244.
[8] *Ibid.*, at p. 252.
[9] *Ibid.*; *Brierly* v. *Kendall* (1852) 17 Q.B. 937; *Chinery* v. *Viall* (1860) 5 H. & N. 288; *Johnson* v. *Stear* (1863) 15 C.B.(N.S.) 330.
[10] [1918] 2 K.B. 808.

option to purchase. Like any other legal chose in action this may be assigned legally or equitably. The cases mentioned above are examples of equitable assignments, for whether or not they were in writing no notice appears to have been given to the owners, and no reference was made to section 25 (6) of the Judicature Act, 1873.[11] No particular form is required for an equitable assignment: all that is required is an intention to assign, and thus an intention to transfer to the "purchaser" all the hirer's rights is sufficient. Apparently if the intention is to transfer the property in the goods this will be construed as an intention to assign the hirer's rights.

Certain rights are, however, incapable of assignment. In particular, there can be no assignment of the benefit of contracts of a personal nature.[12] Here it is important to distinguish the benefit of the contract from its burden: the benefit of the option to purchase the goods is not the same as the burden of looking after them. The hirer is bound to take care of the goods in accordance with the provisions of the hire-purchase agreement, and even if the agreement is silent he is liable as a bailee to take reasonable care of the goods. This burden cannot of course be assigned to the "purchaser": the original hirer remains liable. But the benefit of the option to purchase is different. Referring to the assignment of the option to purchase a piano in *Whiteley* v. *Hilt*, Swinfen Eady M.R. said: "There is no reason whatever for supposing that any personal element entered into the mind of either of the parties to the agreement . . . or that there were any grounds for taking this contract out of the well-settled general rule that the benefit of a contract is assignable in equity and may be enforced by the assignee."[13] This would seem to apply to the option to purchase created by every hire-purchase agreement of goods.

But although the option to purchase is an assignable contract, plainly the assignee cannot be in any better position than the assignor; and whether the assignment is legal or equitable he takes subject to equities existing at the date the owner receives notice of the assignment. If, therefore, the option is so drawn that it is a conditional option, neither the hirer nor the assignee will be able to exercise it if the condition is broken. Thus if the option to purchase can only be exercised "provided that the hirer shall not have committed any breach of the provisions of this agreement," and either the purported sale or the assignment itself is a breach of one of those provisions, the option will no longer be

[11] Now s. 136 of the Law of Property Act, 1925.

[12] *British Waggon Co.* v. *Lea* (1880) 5 Q.B.D. 149; *Kemp* v. *Baerselman* [1906] 2 K.B. 604; *Tolhurst* v. *Associated Portland Cement Manufacturers (1900) Ltd.* [1902] 2 K.B. 660, *per* Collins M.R. at pp. 668–669.

[13] [1918] 2 K.B. at p. 818.

exercisable.[14] Surprisingly enough, although this is now a common form in hire-purchase agreements, there is little reported authority on the effect of such a term. In the case of *United Dominions Trust (Commercial) Ltd.* v. *Parkway Motors Ltd.*[15] McNair J. did not find it necessary to refer to the clause contained in the agreement in those words. Instead, his decision was based on the ground that, irrespective of whether the option to purchase was a personal contract (this point was not considered), the parties could by express agreement render it unassignable.

In that case the defendants purported to buy a motor van which was the subject of a hire-purchase agreement between the plaintiffs and the hirer.[16] The defendants knew that the van was held on hire-purchase terms,[17] but it was a term of the contract of sale that the hirer would pay the plaintiffs the balance due under the hire-purchase agreement together with the sum of ten shillings in respect of the purchase money under the option to purchase. When the hirer failed to do this the defendants themselves tendered the same amount direct to the plaintiffs but the plaintiffs refused to accept it, having on the same day served a notice on the hirer terminating the hire-purchase agreement in accordance with its provisions. The hirer's breach giving rise to the plaintiffs' right to terminate the agreement (and the only breach on the relevant date, according to the facts found by McNair J.) was the purported sale contrary to a clause that the hirer should "not sell, offer for sale, assign or charge the goods or the benefit of this agreement." The plaintiffs now claimed in detinue for the return of the van or its value of £350.

The defendants, relying on *Belsize Motor Co.* v. *Cox*,[18] denied that the plaintiffs were entitled to possession of the van, and said that they were entitled to no more than £96, the balance of the hire-purchase instalments, and ten shillings, the purchase money under the option. McNair J. distinguished the earlier case, holding that the clause prohibiting sale in that case[19] was in no way comparable with the clause[20] in the present case. He did not draw attention to the fact that the clause[19] in the *Belsize* case prohibited sale only if it was without the owners' consent, whereas

[14] Indeed, it may be so drafted that it is no longer in existence at all, the whole contract being discharged by the hirer's breach.

[15] [1955] 1 W.L.R. 719; [1955] 2 All E.R. 557.

[16] The defendants did not "buy" the van from the hirer himself, but the intervention of a fraudulent middle-man may be ignored for present purposes.

[17] Notice of this fact would mean that even if Q.C.'s legislative proposal for the registration of hire-purchase agreements relating to motor vehicles had been adopted the defendants would still not have been protected: see (1954) 17 M.L.R. 238.

[18] [1914] 1 K.B. 244.

[19] "The hirer shall not re-let, sell or part with the possession of the said motor taxi-cab . . . without the previous consent in writing of the owners or their said agents."

[20] "The hirer shall not sell, offer for sale, assign or charge the goods or the benefit of this agreement."

the *United Dominions* clause contained an absolute prohibition, and it is plain that the material difference lies in the fact that whereas the earlier clause merely prohibited the sale of the goods, the present clause prohibited the hirer from assigning not only the goods but also the benefit of the agreement: the option to purchase was incapable of assignment. The defendants had therefore no interest in the goods and no contractual or other rights against the plaintiffs, and were ordered to return the van or to pay its value.[1] The effect was this: of the original hire-purchase price of £626 13s. (including the option money) the plaintiffs had received £530 3s. in hiring instalments, leaving a balance of £96 10s.; they then recovered the van or its then value of £350, receiving a windfall of over £250. Had they accepted the defendants' tender of the balance when it was made they would have suffered no loss, the only financial breach of the agreement, which had been waived, being a delay of twenty days in paying the last instalment which they received. On accepting the balance from the defendants they would then have been in the position they originally contemplated when entering into the agreement.

Jurisdiction to Grant Equitable Relief

The question may now be asked: could the defendants, who had of course paid the full value of the van when they purported to buy it,[2] claim any equitable relief? The report does not indicate that this question was raised, but it may be relevant in other cases. It is proposed to consider first whether the hirer himself can seek such relief and then, if he can, whether the defendants, as the hirer's assignees, can do so. There is, of course, no right to equitable relief. The problem is rather whether the court has power to grant such relief and, if it has, on what principles that power will be exercised. It will be convenient to refer to the power of the court to grant relief as the hirer's right *to claim* equitable relief.

The hirer's own claim for equitable relief might arise in a number of ways. Apart from an actual "sale" of the goods, he might simply break the agreement by failing to pay an instalment on the due date. He might break it by offering the goods for sale, even though no sale resulted, even though payments were punctually made to the owners, and even though he remained in possession of the goods. In these circumstances the owners could,

[1] It is not proposed to discuss here how far the grounds for the decision given by the learned judge can be supported. The matter is considered shortly by Mr. J. Bickford Smith in an article on "Two Hire-Purchase Problems" in the *Law Journal*, Vol. CV, p. 499. As to the effect of a law prohibiting the assignment of a contract, *cf. Re Turcan* (1888) 40 Ch.D. 5 at p. 10, *per* Cotton L.J. As indicated above, there is another (and, it is suggested, stronger) ground on which the same result could be reached.

[2] In fact they paid £410 12s. 0d.

under an agreement in the form in the *United Dominions* case,[3] serve notice terminating the agreement and retake possession of the goods. The hirer could no longer claim to exercise the option to purchase since it could only be exercised "provided that the hirer shall not have committed any breach of the provisions of this agreement." The hirer might have paid the major part of the hire-purchase price. Would the owners' claim to the return of the goods be upheld even though the hirer tendered the whole of the unpaid balance and the purchase money under the option? If he did not tender the money, would he be entitled to any repayment of the instalments he had already paid?

It may be that the principles on which equitable relief will be granted will vary according to the manner in which the hirer has broken the agreement. Thus, in considering whether to grant relief against forfeiture of a lease for breach of covenant, equity would only grant relief if the breach was non-payment of rent. In particular, no relief would be granted for breach of a covenant not to assign without consent.[4] But it seems that the reason was that equity would only grant relief where the court could give compensation for the breach, and in the latter case the damage sustained could not be accurately assessed.[5] Such considerations may not be relevant in connection with the breach of hire-purchase agreements, and of course the court will take into account the type of breach in deciding whether the hirer is in all the circumstances entitled to relief.

The case usually cited[6] for the proposition that equity will not relieve the hirer against a forfeiture caused by default in punctual payment of instalments is *Cramer* v. *Giles*.[7] Here a piano was let by the plaintiffs on "the purchase-hire system," on the terms that payment of sixty guineas should be made in twelve quarterly instalments of five guineas, the piano to become the property of the hirer on payment of all the instalments. Until full payment of the sixty guineas the piano was to remain the sole and absolute property of the plaintiffs and was only lent on hire to the hirer. In case of default in the punctual payment of any instalment, the instalments previously paid were to be forfeited to the plaintiffs who were thereupon to be entitled to resume possession of the instrument. The hirer duly paid the first ten instalments, amounting to fifty guineas, but defaulted in payment of the last two instalments. Shortly afterwards the remaining ten guineas were offered to the plaintiffs, but this was refused and

[3] [1955] 1 W.L.R. 719; [1955] 2 All E.R. 557.
[4] *Barrow* v. *Isaacs* [1891] 1 Q.B. 417, C.A. The position is now different: Law of Property Act, 1925, s. 146.
[5] See *per* Eldon L.C., *Hill* v. *Barclay* (1811) 18 Ves. 56 at p. 63.
[6] See, for example, 16 *Halsbury* (Hailsham ed.), p. 520; Earengey, *The Law of Hire-Purchase*, 2nd ed., p. 85; I. H. Jacob, *The Law of Hire-Purchase*, p. 132.
[7] (1883) Cab. & El. 151; affirmed *sub nom. Cramer* v. *Carlton, The Times*, May 9, 1884.

they sued for the return of the piano. The case was heard at first instance by Lopes J. in the Queen's Bench Division, and the short report simply states that "Lopes J. ruled that time was of the essence of the contract and that the plaintiffs were entitled to the piano."[8] There is no indication of the argument directed to the question of equitable relief, and no statement of the reasons for the decision. The decision was upheld by a strong Court of Appeal.[9] Here the only reference to equitable relief is in the judgment of Fry L.J. who stated that it was not in his opinion a case for equitable relief, a statement as consistent with the view that such relief would be granted in an appropriate case as with the view that equitable relief will never be granted in such a case.

Neither the report of this case at first instance[10] nor that on appeal[11] gives sufficient information to make it clear whether the "purchase-hire" agreement was a true hire-purchase agreement or whether the "hirer" was bound to pay the whole of the price[12]; the case was of course heard before the decision of the House of Lords in *Helby* v. *Matthews*.[13] But although a true hire-purchase agreement is not a contract of sale, it does contain an element of sale imported by the option to purchase.[14] It is therefore submitted that for this purpose the difference between a hire-purchase agreement and a contract for the sale of goods is not of importance. There is, it is suggested, a tendency for the courts to apply similar rules wherever possible. For instance, where, in a contract of sale, the seller is in breach of the implied condition that he has the right to sell the goods,[15] the buyer is entitled to the return of the whole of the purchase price and the seller is not entitled to retain an allowance for the use the buyer has had of the goods during the period before the breach of condition is discovered.[16] It might be thought that the position would be different where the owner is in breach of a term in a hire-purchase agreement that he is the owner of the goods and is entitled to give the hirer an option to purchase them, particularly where the agreement describes the instalments paid by the hirer

[8] Cab. & El. 151.

[9] Brett M.R., Bowen and Fry L.JJ.: *Cramer* v. *Carlton*, *The Times*, May 9, 1884.

[10] (1883) Cab. & El. 151.

[11] *The Times*, May 9, 1884.

[12] It was probably a credit-sale agreement in the *Lee* v. *Butler* form: see 16 *Halsbury* (Hailsham ed.), p. 520, note (*d*). Chitty on *Contracts* (21st ed.), Vol. 2, p. 316, also cites *British Motor Cab Co.* v. *Atlee* (1914) 58 S.J. 807. This was plainly a credit-sale agreement, and the question of equitable relief was neither argued (the defendant appeared in person) nor referred to in the short judgment of Shearman J.

[13] [1895] A.C. 471.

[14] See *per* Goddard J. (as he then was) in *Karflex Ltd.* v. *Poole* [1933] 2 K.B. 251 at p. 264.

[15] Sale of Goods Act, 1893, s. 12 (1).

[16] *Rowland* v. *Divall* [1923] 2 K.B. 500, C.A.

as "rent." In *Warman* v. *Southern Counties Car Finance Corporation Ltd.*[17] the agreement did this, and the owners claimed to be entitled to retain out of the instalments paid the reasonable charge of hiring the car to the hirer for the period during which it was in his possession. Finnemore J. rejected this argument, pointing out that the option to purchase is the essential part of the agreement: "when people enter into a hire-purchase agreement they enter into it not so much for the purpose of hiring, but for the purpose of purchasing. . . . It might well be right to say that if at any stage the option to purchase goes, the whole value of the agreement to the hirer has gone with it. If he wanted to make an agreement merely to hire a car he would make it."[18]

Furthermore, the judicial attitude to hire-purchase has perhaps changed in the course of time. At one period it may have been felt that there was something hardly respectable about the hire-purchase agreement, that only improvident people, the extravagant and the impecunious, would enter into such transactions, although in *Helby* v. *Matthews* itself Lord Macnaghten said: "I do not see why a person fairly solvent and tolerably prudent should not make himself the owner of a piano . . . on such terms."[19] The growing use of such agreements has now become widespread if not universal, although there has not yet been judicial support for the opinion[20] that "it is not unlikely that the hire-purchase system, if it has not already done so, will shortly be held to have almost wholly destroyed the efficacy of the reputed ownership clause."[1]

A good example of the changing attitude of the courts is the "minimum payment" clause common in hire-purchase agreements. This is a clause providing that if the hirer defaults the owner can not only recover the goods but also claim payment of a proportion of the instalments not yet due or perhaps a sum sufficient to bring the hirer's payments up to a specified amount.[2] There was a number of decisions[3] indicating that no equitable relief could be given if the owner sought to enforce such a clause and that however exorbitant the amount claimed it could not be regarded as a penalty. This view was reinforced by the fact that the legislature thought it necessary to make special provision for such clauses by section 4 of the Hire-Purchase Act, 1938. But a majority of the Court of Appeal in *Cooden Engineering Co. Ltd.* v.

[17] [1949] 2 K.B. 576.
[18] *Ibid.*, p. 582.
[19] [1895] A.C. at p. 482.
[20] Williams on *Bankruptcy*, 16th ed., p. 319.
[1] *i.e.*, of s. 38 (*c*) of the Bankruptcy Act, 1914.
[2] The position where the agreement requires such payments on the hirer's exercising his right to return the goods is not yet clarified.
[3] *Elsey & Co. Ltd.* v. *Hyde* (1926), unreported, cited Jones & Proudfoot's *Notes on Hire-Purchase Law*, 2nd ed., at p. 107; *Chester & Cole Ltd.* v. *Wright* (1930), *ibid.*, pp. 124 and 129; *Re Apex Supply Co. Ltd.* [1942] Ch. 108.

Stanford[4] held that such a clause might be regarded as a penalty and that if it was the sum claimed would not be recoverable.[5]

It is therefore suggested that there is today no reason to suppose that the courts will treat hire-purchase agreements in a manner different to contracts for the sale of goods as far as equitable relief against forfeiture is concerned. In the latter type of contract the position was recently clarified by the decision in *Stockloser* v. *Johnson*.[6] This was a contract for the sale of goods to be paid for by instalments. It provided that if the buyer made default in payment of any instalment for a period exceeding twenty-eight days the seller was to be entitled to rescind the contract, recover the goods, and forfeit the instalments paid. The Court of Appeal unanimously held that the court had jurisdiction to relieve against forfeiture of instalments even though the contract had been rescinded. Romer L.J. thought that this jurisdiction arose only if there were some special circumstances, such as fraud, sharp practice or other unconscionable conduct on the part of the seller, but Somervell and Denning L.JJ. took a wider view. "Two things are necessary," said Denning L.J.[7]: "first, the forfeiture clause must be of a penal nature, in this sense, that the sum forfeited must be out of all proportion to the damage, and, secondly, it must be unconscionable for the seller to retain the money."[8]

The question posed above in relation to the hirer's claim to equitable relief may now be answered with some measure of confidence. It is submitted that the court may grant relief, possibly in permitting the hirer to retain the goods on payment of the whole of the unpaid balance of the hire-purchase price,[9] and certainly by preventing the owner from forfeiting the whole of the instalments already paid, in accordance with the principles laid down in *Stockloser* v. *Johnson*.[10] Whether relief will actually be granted in any particular case depends, of course, on all the facts.

The final question is: can the purported purchaser claim equitable relief? There is no comparable authority on the right of the assignee of a lease to ask for relief against forfeiture for the breach involved in the assignment to him because there was originally no right to relief in such a case[11]; in claiming relief

[4] [1953] 1 Q.B. 86.

[5] This decision has since been applied by Denning L.J. in *Lamdon Trust* v. *Hurrell* [1955] 1 W.L.R. 391.

[6] [1954] 1 Q.B. 476, C.A.

[7] *Ibid.*, at p. 490.

[8] The conduct of the buyer—whether he comes to equity with clean hands—will presumably be considered either as a third point or when considering whether it is unconscionable for the seller to retain the money.

[9] The comparable question did not arise in *Stockloser* v. *Johnson* because the buyer was not in a position to make such a payment and, in fact, was not in the circumstances entitled to equitable relief at all because the conditions for such relief were not satisfied.

[10] [1954] 1 Q.B. 476, C.A.

[11] *Barrow* v. *Isaacs* [1891] 1 Q.B. 417.

now under section 146 of the Law of Property Act, 1925, the assignee appears to be in the same position as the tenant.[12]

There are two ways in which the purported purchaser may have a right to relief. The hirer's right to claim equitable relief may only be enforced by proceedings and it may therefore be regarded as an equitable chose in action which may be assigned in equity. The "purchaser" may therefore claim as the assignee of the hirer's equitable rights.[13] The second way in which the purported purchaser may claim relief is by virtue of the court's inherent jurisdiction as a court of equity to grant relief to a defendant. It may be that the original hirer acted fraudulently in purporting to sell the goods or that for some other reason he himself has no claim to the assistance of equity. There is therefore in those circumstances no equitable right to be assigned. Nevertheless the "purchaser" may himself be perfectly innocent and a suitable object for equity's intervention. In most cases, indeed, however innocent the original hirer, the "purchaser" is likely to be even more worthy of relief.[14] Where the court is faced by the plaintiff's legal right to possession of the goods, and the defendant's claim for equitable relief which may be granted on terms which ensure that the plaintiff suffers no loss, it is suggested that there is no reason, on principle or authority, why the court may not in suitable cases make an order which ensures justice for both parties.

POSTSCRIPT

The argument above has dealt solely with the position at common law (including equity). It remains to consider whether the position has been affected by the Hire-Purchase Act, 1938.[15]

There is one obvious effect of the Act. The number of cases in which any argument as to equitable relief may be called for is now limited to those hire-purchase agreements not within the scope of the Act. Where the Act applies, and pursuant to section 12 an action to recover the goods is commenced after one-third of the hire-purchase price[16] has been paid or tendered, the court has a statutory discretion under section 12 (4).[17] No doubt many hire-purchase agreements today are within the financial limits of the Act, for under the 1954 Act the statutory provisions apply to all hire-purchase agreements where the hire-purchase price[18]

12 Law of Property Act, 1925, s. 146 (5).

13 It may be that such an assignment must be in writing, but it is not proposed to discuss here the scope of s. 53 (1) (*c*) of the Law of Property Act, 1925.

14 For an example (in the sphere of insurance) where it has been suggested that an assignee might be in a better position than his assignor, see the speech of Lord Atkin in *Beresford* v. *Royal Insurance Co.* [1938] A.C. 586, 600.

15 As amended by the Hire-Purchase Act, 1954. The latter Act inexplicably fails to provide a joint citation with the Hire-Purchase Act, 1938.

16 As defined in s. 21 of the 1938 Act and s. 3 of the 1954 Act.

17 See below. References to sections are to the 1938 Act.

18 See note 16, *supra*.

does not exceed £1,000 in respect of livestock, and £300 in respect of all other goods.[19] There is no doubt, however, that the Act still does not apply to a considerable number of hire-purchase agreements.[20]

There is another way in which the Act must be considered in relation to the above argument. It may be said that one of the objects of the Act was to prevent unscrupulous owners of goods let on hire-purchase from forfeiting the goods where a substantial proportion [1] of the hire-purchase price had been paid. If the conclusions of the above article are correct, the court has always had power to grant equitable relief in such cases and sections 11 and 12 of the Act were unnecessary. Since Parliament must be presumed to know the law, this is cogent evidence that such a power did not, and does not, exist.

It is not difficult to refute such an argument. It may be conceded that the general opinion in 1938 [2] was that no such power existed. But it is suggested that only if the provisions of the Act are inconsistent with the existence of such a power will the reasoning above be impugned.[3] In reality, however, there is no inconsistency.

Section 11 of the Act provides that after one-third of the hire-purchase price has been paid or tendered "the owner shall not enforce any right to recover possession of the goods from the hirer [4] otherwise than by action." [5] This is, of course, an important provision, for apart from the Act there is nothing to prevent the owner recovering possession of the goods, where he has the right to do so, in any peaceable way he can. It was, for example, common before the Act for agreements to give the owner power

[19] There is no longer a different figure for motor vehicles.

[20] In the first three months of 1956 approximately one-third in value of all hire-purchase agreements entered into in this country was in respect of motor vehicles and caravans: see (1956) 170 *Board of Trade Journal*, p. 686; *The Times*, January 5, 1956. It appears likely that at least half of those particular agreements had a total hire-purchase price of more than £300 (see Table 5 on p. 687 of 170 B. of T. Jnl.; *cf.* the statistics published by H.P. Information Ltd., *The Times*, January 5, 1956). In the year ended December 31, 1955, hire-purchase agreements were entered into in respect of 85,330 new cars according to H.P. Information Ltd. It is unlikely that many of these were within the limits of the Act. The hire-purchase agreement in *United Dominions Trust* v. *Parkway Motors* [1955] 1 W.L.R. 719, above, was, for example, outside even the new financial limits of the Act.

[1] *i.e.*, at least one-third: s. 11.

[2] And, indeed, today: see the works cited above.

[3] *Cf.* the attitude of the Court of Appeal to s. 4 of the Act in *Cooden Engineering Co.* v. *Stanford* [1953] 1 Q.B. 86, above.

[4] "Hirer" includes a person to whom the hirer's rights or liabilities under the agreement have passed by assignment or by operation of law: s. 21 (1). Presumably the owner may still recover the goods without action from someone who purported to buy the goods from the hirer unless the hirer's rights have passed to the "purchaser." This poses the question of whether an assignment has been effected. See generally above.

[5] s. 11 (1). s. 11 (2) penalises the owner if he contravenes this provision, which does not apply where the hirer himself lawfully determines the agreement or the bailment: s. 11 (3).

to enter the hirer's premises to recover possession of the goods.[6] While it is true that where the Act applies such terms are now void,[7] the owner could still, apart from section 11, take physical steps to recover the goods where it is possible to do so without committing a trespass.[8] Section 11 now makes it essential for legal proceedings to be commenced, thereby giving the hirer an opportunity of appearing in court, and giving the court an opportunity of exercising its statutory [9] discretion.[10]

Then section 12 (4) gives the court [11] which hears the owner's action to recover the goods certain powers, namely power to make the following orders: (a) an order for specific delivery of all the goods to the owner, (b) an order for the specific delivery of all the goods to the owner postponed on certain conditions, or (c) an order apportioning the goods between the parties. That there is nothing here inconsistent with the court's power to grant equitable relief is shown by the preceding words of the subsection: ". . . the court may, without prejudice to any other power . . ." The power referred to in (c) may well be a power which the court never had before the Act, even if it did possess the power to grant equitable relief. The provisions of section 12 (4) are therefore quite consistent with the court having had, and retaining, a power to grant equitable relief, although, of course, the court's statutory powers are so wide that there will be no need to rely on the court's equitable jurisdiction in cases where the Act applies.

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6 See, for example, *Hackney Furnishing Co.* v. *Watts* [1912] 3 K.B. 225, D.C.; *Jays Furnishing Co.* v. *Brand* [1915] 1 K.B. 458, C.A.

7 s. 5 (*a*).

8 *e.g.*, by retaking possession of a car in the street.

9 Or equitable.

10 Even if the hirer could, quite apart from the Act, commence proceedings asking for equitable relief, it is of course unlikely that he would do so, particularly where the agreement is of low value.

11 The action must be commenced in the county court: s. 12 (1).

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THE AMBATIELOS CASE

On March 6, 1956, an international arbitration commission, sitting at No. 10, Carlton House Terrace, London, delivered its Award in the *Ambatielos* case. For a number of reasons, this case, although little mentioned in the newspapers, seems destined to become a *cause célèbre* in the annals of international law. In the first place, the dispute was a bone of contention between the two Governments concerned, those of the United Kingdom and Greece, for a period of some thirty years. Secondly, in addition to requiring the establishment of a very strong arbitration commission, the dispute came before the International Court of Justice itself on two occasions.[1] Thirdly, the sum of money at stake, being of the order of £8,000,000, was by no means negligible. Fourthly, the legal issues involved, including as they did such questions as the interpretation of a most-favoured-nation clause and a clause granting "free access" to courts in a commercial treaty, not to mention more general problems such as the principle of "extinctive prescription," the rule of the exhaustion of local remedies, and the treatment of a national of one State by the judicial and executive authorities of another, were of considerable importance. Finally, arbitration itself has been somewhat out of favour lately as a means of settling international disputes. There has been a tendency to feel, on the one hand, that these disputes are not really suitable for settlement by legal means at all, and this tendency has expressed itself in the greater reluctance on the part of States, as compared with the inter-war period, to accept the compulsory jurisdiction of the International Court of Justice at The Hague. On the other hand, it has been felt that, where legal means of settlement are possible, then the International Court itself should be employed rather than the older, less authoritative and in many ways more awkward method of arbitration.[2] Consequently, today, the mere holding of a major arbitration is something of an event in the international law world.

The origin of the dispute lay in a contract concluded on July 17, 1919, between Mr. Nicholas Eustache Ambatielos, a Greek national, and the Ministry of Shipping.[3] The Shipping Controller at the time was Sir Joseph (later Lord) Maclay. Under the contract Mr. Ambatielos undertook to buy for £2,275,000 nine

[1] *I.C.J. Reports* 1952, p. 28; *ibid.* 1953, p. 10.

[2] For some of the reasons why, internationally, arbitration may be a less convenient method of settling disputes than reference to the International Court of Justice, see the article by the present writer in *British Year Book of International Law*, Vol. 30 (1953), p. 152, especially at p. 175.

[3] The text of the contract is given in *I.C.J.*, *Pleadings, Oral Arguments, Documents, Ambatielos Case* (referred to subsequently as *Pleadings*), p. 26.

ships which were then building in the yards of Hongkong and Shanghai to the order of the Ministry. The contract did not clearly specify precise dates for the delivery of the ships, but it was provided in clause 3 that "The steamers shall be deemed ready for delivery immediately after they have been accepted by the Vendor (*i.e.*, the Ministry) from the Contractors (*i.e.*, the shipbuilders)." It was also provided in clause 7 that "If default be made by the Vendor in the execution of Legal Bills of Sale or in the delivery of the steamers in the manner and within the time agreed, the Vendor shall return to the Purchaser the deposit paid with interest at the rate of five pounds per cent. per annum."

Mr. Nicholas Ambatielos was not in London at the relevant time, the contract being negotiated on his behalf by his brother, Mr. G. E. Ambatielos, and actually signed on his behalf by a marine surveyor. For the Ministry the contract was negotiated by a Major Bryan Laing, Assistant Director of Ship Purchases and Sales, and was actually signed by the Secretary to the Ministry. Seven ships were delivered to Mr. Ambatielos at various dates between October, 1919, and June, 1920, and of these five were fully paid for. By this time the Eastern freight rates had fallen considerably and Mr. Ambatielos, being in financial difficulties, executed in November, 1920, mortgages and accompanying deeds of covenant [4] in respect of the seven ships that had been delivered, by the terms of which the money owed was to be paid off by instalments and the ships were to be released as the debt was reduced. On various dates in 1921 the Board of Trade (as successor to the Ministry of Shipping) brought actions *in rem* in the Admiralty Court for valuation and sale of three of the ships and an action *in personam* against Mr. Ambatielos for recovery of principal and interest.

In these proceedings, which were held before Hill J., the defendant attempted to set up a verbal agreement between Major Laing and Mr. G. E. Ambatielos, and contended that this agreement was admissible as explaining the terms of the written agreement. It was argued that the expression "within the time agreed" in clause 7 of the written contract referred to some dates written down on a buff slip of paper during the negotiations; that these dates, which were based on reports from the dockyards, were agreed delivery dates; that the ships were not delivered within these dates; and that, as a result of the late delivery and the intervening fall in freight rates, the defendant had suffered very heavy losses. Hill J., however, in a judgment delivered on January 15, 1923, held that, though the written contract was "somewhat loosely drafted," it nevertheless was clear in itself, and that consequently evidence of the alleged verbal agreement was not admissible. He also pointed out that even if the evidence were

[4] *Pleadings*, p. 33.

admissible, it would not be possible to say exactly what the agreed dates were, as a good many dates were mentioned during the negotiations; and that in any case " Major Laing had no authority to finally agree the terms of the sale." As for the failure of the Ministry to deliver the remaining two ships, Hill J. held that the defendant never was ready and willing to pay the balance of the sale price against delivery.[5]

Early in 1923, Mr. Ambatielos, having given notice of appeal from the judgment of Hill J., applied to the Court of Appeal for leave to call Major Laing and Sir Joseph Maclay. Neither of these gentlemen had been called at the trial. Probably Sir Joseph Maclay could have thrown little light on the transaction. Major Laing obviously knew a good deal about it but both sides, it seems, were uncertain what he would say. In support of his application Mr. Ambatielos alleged that, in a letter written to Sir Joseph Maclay in 1922, Major Laing had made certain statements which amounted to further proof of the alleged verbal agreement, and that Sir Joseph in reply had more or less accepted Major Laing's account. Mr. Ambatielos now had copies of these letters in his possession. He admitted that, even before the trial, Major Laing had read to him part of the contents, but he said that at the time he had not received " a correct impression as to the meaning of the letters." [6] The Court of Appeal rejected the application, Scrutton L.J., in particular, saying, " it would be contrary to the settled principles of this court to allow a man who has considered the situation and taken his chance, to have another try when he finds the chance has gone against him." If this were allowed, said Bankes L.J., " there would be no end to litigation." [7]

Mr. Ambatielos abandoned his general appeal to the Court of Appeal and did not appeal to the House of Lords on the fresh evidence point. Instead he had recourse to diplomatic intervention. In 1925 the Greek Legation in London requested the Foreign Office to secure a revision of the case, but the request was declined. In notes delivered in 1933, 1934 and 1936 the Greek Government suggested in general terms an international arbitration. This suggestion too was refused. In 1939 the Greek Government more specifically suggested that there had been a breach of Article 15 (3) of the Anglo-Greek Treaty of Commerce and Navigation of November 10, 1886, and therefore that there should be an arbitration under the arbitration protocol attached to that Treaty. Like most international arbitration agreements of the time, however, this protocol provided for " voluntary " rather than " compulsory " arbitration. That is to say, an arbitration could only take place if both sides were agreeable, and the United Kingdom Government

[5] For the judgment of Hill J., see *Pleadings*, p. 183; or 14 Ll.L.Rep. 4.
[6] *Pleadings*, pp. 32–33.
[7] *Pleadings*, p. 205; or 14 Ll.L.Rep. 387.

was not agreeable, contending that Article 15 (3) of the 1886 Treaty had nothing to do with the case.[8]

In proceedings before the International Court of Justice in 1952–1953,[9] the Greek Government sought to persuade that Court to hear the Ambatielos claim. It was contended that the Anglo-Greek Treaty of Commerce and Navigation of 1886 had been replaced by a similar Treaty of July 16, 1926[10]; that Article 29 of the latter Treaty provided for the compulsory reference to the Court of disputes "as to the proper interpretation or application of any of the provisions of the present Treaty"; and that, since the two treaties had the same purpose, the Court should consider itself entitled to exercise jurisdiction over disputes relating to the 1886 Treaty. The Court, however, declined to exercise jurisdiction over the dispute, holding that its jurisdiction was confined to the 1926 Treaty and did not cover the 1886 Treaty. But the Court also held that it had jurisdiction to consider whether the United Kingdom was obliged to agree to an arbitration under the 1886 protocol. The reason was that there had been signed, on the same day as the Treaty of 1926, a Declaration which stated that "It is well understood that the Treaty of Commerce and Navigation between Great Britain and Greece of today's date does not prejudice claims on behalf of private persons based on the provisions of the Anglo-Greek Commercial Treaty of 1886, and that any differences which may arise between our two Governments as to the validity of such claims shall, at the request of either Government, be referred to arbitration in accordance with the provisions of the protocol of November 10, 1886, annexed to the said Treaty." Later the Court held that the Ambatielos claim was sufficiently "based" on the 1886 Treaty to warrant the conclusion that an arbitration commission ought to be set up under the 1886 protocol. The Court was careful to state, however, that the merits of the dispute, as well as certain preliminary issues raised by the United Kingdom, such as the questions of undue delay and non-exhaustion of local remedies, would be entirely for the Commission to decide.

By an agreement of February 24, 1955,[11] the two Governments established a Commission consisting of M. Ricardo J. Alfaro (Panama); M. Algot J. F. Bagge (Sweden); M. Maurice Bourquin (Belgium); M. John Spiropoulos (Greece); and Gerald Thesiger,

[8] The texts of all these documents are available in the *Pleadings* volume. Article 15 (3) of the 1886 Treaty was a standard provision and read as follows: "The subjects of each of the two Contracting Parties in the dominions and possessions of the other shall have free access to the Courts of Justice for the prosecution and defence of their rights, without other conditions, restrictions, or taxes beyond those imposed on native subjects, and shall, like them, be at liberty to employ, in all causes, their advocates, attorneys or agents, from among the persons admitted to the exercise of those professions according to the laws of the country."

[9] *Loc. cit.*

[10] For text see *Pleadings*, p. 56.

[11] Treaty Series, No. 20 (1955).

Esquire, Q.C. (United Kingdom). The agreement also provided that M. Alfaro should be President of the Commission, which in turn appointed Dr. Edvard Hambro (Norway) as its Registrar. After written pleadings and oral arguments had been exchanged,[12] the Commission delivered its Award.[13]

The principal allegations of fact made by the Greek Government were the following; that the United Kingdom Government contracted in 1919 to sell to Mr. Ambatielos nine ships to be delivered at or before agreed dates; that this contract was broken, involving Mr. Ambatielos in heavy loss; that the United Kingdom Government, by withholding certain documents "under cover of State privilege . . . whereas a proper exercise of State privilege would have required that those documents should all have been placed before the Court,"[14] by not calling Major Laing as a witness, and by not making known to Mr. Ambatielos the evidence which Major Laing could give, procured a miscarriage of justice before Hill J.; and that "when Mr. Ambatielos, through his advisers, applied to the Court of Appeal for leave to call further evidence, the Board of Trade ought to have consented to and indeed ought to have assisted that application, but instead the Board of Trade opposed it and persuaded the Court of Appeal to reject the application." Earlier charges that the English courts had acted improperly were withdrawn. The whole weight of the attack was directed against the civil servants concerned. Even they were accused, not so much of breaking the English law, as of behaving "improperly," "abusing privileges" and "misbehaving." This "misbehaviour," it was said, amounted to a breach of Article 15 (3) of the 1886 Treaty, and also of Article 10, the most-favoured-nation clause in the Treaty.[15] Article 10 was said to have been broken in that, through it, Greek nationals in the United Kingdom

[12] The Commission heard, on behalf of the Greek Government, Sir Frank Soskice Q.C., Mr. John Colombos Q.C., Professor Henri Rolin, and Mr. Frank Gahan Q.C.; and, on behalf of the United Kingdom Government, Sir Harry Hylton-Foster Q.C., M.P., Mr. John Foster Q.C., M.P., Sir Gerald Fitzmaurice K.C.M.G., and Mr. F. A. Vallat C.M.G.

[13] This article is based on a transcript of the Award. The arbitration agreement, however, provides for publication of the Award. It is noted that the Commission took the useful step of transmitting a copy of the Award to the Permanent Court of Arbitration. The Commission, however, was not in any direct sense a tribunal of that Court.

[14] This was the gravamen of the Greek complaint. In fact, the Maclay/Laing letters were "withheld" as being letters brought into existence as part of the preparation of the Crown's case, whilst certain other documents were not produced as part of the normal practice of not producing inter-departmental minutes.

[15] This Article read as follows: "The Contracting Parties agree that, in all matters relating to commerce and navigation, any privilege, favour, or immunity whatever which either Contracting Party has actually granted or may hereafter grant to the subjects or citizens of any other State shall be extended immediately and unconditionally to the subjects or citizens of the other Contracting Party; it being their intention that the trade and navigation of each country shall be placed, in all respects, by the other on the footing of the most-favoured nation."

were entitled to the benefits of certain provisions in treaties between the United Kingdom and other countries; that these benefits included treatment according to "the principles of international law" as well as according to "justice and equity" [16]; and that Mr. Ambatielos had not received the treatment to which he was entitled. On the United Kingdom side it was urged that the Greek claim was time-barred through undue delay in its presentation on the basis of the 1886 Treaty; that it was in any case inadmissible, as Mr. Ambatielos had not exhausted the local remedies; and, finally, that no breach of the 1886 Treaty had been shown.

The Commission rejected the plea of delay. This is not surprising, seeing that the International Court of Justice had already found that the Greek Government had not done "anything improper" in instituting proceedings in 1951 which it could have instituted at any time since 1926. There is no fixed period of limitation in international law, but it is generally thought that the defendant is entitled to succeed with a plea of "extinctive prescription" if he can show that he has been seriously prejudiced by an unreasonable delay for which he is not responsible. The Commission held, however, that the fact that the Greek Government did not base its claim on the 1886 Treaty until 1939 was irrelevant. What mattered was that, as early as 1925, it had drawn the attention of the United Kingdom Government to the case, so that the latter Government was, as it were, put on the alert.

The Commission accepted the plea that local remedies had not been exhausted. The main ground was not, as might have been supposed, that Mr. Ambatielos had abandoned his general appeal, or that he had failed to appeal to the House of Lords as regards his claim to adduce new evidence. There was some reason for believing that these failures might have come within the admitted exception that local remedies need not be exhausted if they are "obviously futile." But what had made any question of appeal futile in this case was Mr. Ambatielos' failure to call Major Laing in the Admiralty Court. The Commission held that this failure both constituted a failure to exhaust local remedies in itself and also disqualified Mr. Ambatielos from relying on the exception. This ruling is of considerable importance, because the requirement that local remedies be exhausted has always been applied previously

[16] The provision principally relied upon was Article 10 of the Anglo-Bolivian Treaty of 1911, in which the parties, after agreeing to abstain from diplomatic intervention "in cases of claims or complaints on the part of private individuals affecting civil or criminal matters in respect of which legal remedies are provided," reserved the right to exercise such intervention "in any case in which there may be evidence of delay in legal or judicial proceedings, denial of justice, failure to give effect to a sentence obtained in his favour by one of their nationals or violation of the principles of international law." Reliance was also placed upon a number of treaties concluded by England in the seventeenth century, *e.g.*, the Anglo-Danish Treaty of 1670, in which the parties undertook to "cause justice and equity to be administered to the subjects and people of each other, according to the laws and statutes of either country" (*Pleadings*, pp. 509–515).

in relation to a failure to appeal to a higher court against the decision of a lower court. As the Commission said, however, "These 'local remedies' include not only reference to the courts and tribunals but also the use of the procedural facilities which municipal law makes available to litigants before such courts and tribunals. It is the whole system of legal protection, as provided by municipal law, which must have been put to the test before a State, as the protector of its nationals, can prosecute the claim on the international plane." This ruling seems to be in accordance with principle and common sense. M. Alfaro, however, while accepting the principle, disagreed with its application by the majority. He thought that Mr. Ambatielos had exhausted procedural remedies by exercising his general right of calling witnesses, and that he should not now suffer for his failure to call one particular witness whom, at the time, his advisers thought it best not to call.[17]

The Commission also held that there had been no breach of the 1886 Treaty. The facts disclosed no breach of the "free access" clause. As for the most-favoured-nation clause (Article 10), it had been argued by the United Kingdom that, since the Greek complaint related essentially to the "administration of justice," and since Article 10 related to "commerce and navigation," the Article could not be relied upon at all by the Greek Government so as to attract the benefits of the other treaties. The Commission rejected this view, holding that the judicial protection of the rights of traders could be regarded as covered by the phrase "all matters relating to commerce and navigation." But the Commission also held that, on its true construction, Article 10 of the Anglo-Bolivian Treaty did not have the effect, by virtue of the most-favoured-nation clause in the 1886 Treaty, of incorporating the principles of international law into the latter Treaty. As for the seventeenth-century treaties, they only had the effect of guaranteeing the right of "national treatment," and there was no evidence that Mr. Ambatielos had been discriminated against as a foreigner.

With the finding that the general principles of international law were not incorporated into the 1886 Treaty, the case certainly lost a good deal of its potential interest. The Commission thus had no occasion to consider such questions as (i) whether the English law concerning the disclosure or non-disclosure of documents and the right of a litigant to produce new evidence measures up to international standards, and (ii) whether civil servants, who commit no breach of English law, can still, by "abusing privileges" or

[17] In addition to M. Alfaro's dissent on this point, M. Spiropoulos entered a more general dissenting opinion.

other forms of "misbehaviour," engage the international responsibility of this country. Nevertheless, as was said at the beginning, even those issues on which the Commission did pass were of sufficient weight to ensure for the *Ambatielos* case an important place in the development of international law.

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NOTES OF CASES

Larceny by Mistake—A Comedy of Errors

There can be little room for doubt that, despite the very helpful commentaries which have appeared in the academic journals already,[1] the difficulties which the recent decision of the Divisional Court in *Moynes* v. *Coopper*[2] created for law teachers and practitioners have by no means been resolved, and the significance of the case in the long-standing debate on Larceny by Mistake is not yet clear. It can therefore do little harm, and may conceivably do some good, to try to assess the case once more and state where the source of the confusion may lie and to point to the remedy.

It will be recalled that the case involved the dismissal by the Divisional Court (Lord Goddard C.J. and Hilbery J., with Stable J. dissenting) of an appeal by way of case stated from the decision of the Appeal Committee of the West Kent Quarter Sessions. The magistrates had convicted the defendant of larceny but the Quarter Sessions had allowed an appeal, so the prosecutor asked for a case to be stated. The facts were that the defendant workman, after having received an advance payment of wages, was paid over again by the wages clerk at the end of the week, and when he opened the wage packet later the same day at his home and discovered for the first time the mistake which had been made, he immediately decided to keep the money which had been paid him in error, in addition to the sum of 3s. 9½d. which was his due. It was the prosecutor's contention that this constituted larceny. The appeal committee thought that the case of *R.* v. *Prince*[3] was in point on the consent of the owner to the handing over of the money preventing this from being larceny, and that *R.* v. *Middleton*[4] was distinguishable in that in the present case there was authority on the part of the wages clerk to pass the property in the money and no mistake concerning the identity of the wage packet or its contents or concerning the identity of the accused. They further stated that in their opinion, there being no trespass, there was no stealing.

The Divisional Court in the majority judgment acknowledged that the terms in which the case was stated for their opinion were admirably clear and concise. One could wish that the same description could be applied to this judgment. Unfortunately,

[1] (1956) 72 L.Q.R. 181; (1956) 19 M.L.R. 308.
[2] [1956] 1 Q.B. 439.
[3] (1868) L.R. 1 C.C.R. 150.
[4] (1873) L.R. 2 C.C.R. 38.

however, it qualifies only under the head of brevity, and this after time had been taken for consideration! It is not putting the matter too strongly to say that it is profoundly disappointing to those who have to instruct students in the criminal law, not to mention those whose duty it may be to instruct juries or advise benches of magistrates, to find no clear exposition of the law of larceny in relation to this fairly simple situation. The fault may not lie with this particular court, of course, but may merely stem from the hopeless confusion created by the terms of a poorly drafted statute and the determination of judges in the past not to let obviously dishonest persons go free when they were charged with larceny.

The shortcomings of the majority judgment may be stated as follows. The decision that the defendant was not guilty of larceny was professed to be based on the ground that there had been no taking within the meaning of section 1 (2) (i) (*c*) of the Larceny Act, 1916, whereas in fact it appears to be based on the ground that the owner's consent to parting with the ownership in the money (given through his clerk) prevented the case being one of larceny. In refusing to follow *R.* v. *Hudson*[5] (which many will welcome), the court drew a distinction between the facts of that case and the present case on the slender ground that in the former case "neither the cheque nor the envelope was intended by the sender for the accused," whereas "here there is no doubt that the pay packet was intended for the defendant and was so delivered to him."[6] This distinction is based on the assumption that in *Moynes* v. *Coopper* the pay packet was intended for the defendant and was so delivered to him without any mistake as to his identity (unlike *Hudson*), and once this is accepted then it is difficult to see how it could be said that there was a taking "without the consent of the owner." Indeed, on this basis it becomes unnecessary to go into the question of taking at all. Moreover, it becomes possible to accept the reasoning of the appeal committee distinguishing *Middleton*. It is submitted that if the whole problem had been approached more logically by the court it could have been quite simply resolved.

The case might well have been viewed as involving two successive hurdles or obstacles which the prosecution must surmount if they are to succeed. The first concerns the consent of the owner to parting with the possession or property in the goods or, as in this case, the money. This is the territory occupied by the old common law phrase *invito domino*. It must be proved that the owner or his servant or agent did not consent to parting with ownership or property in the subject-matter of the crime and in case of mistaken delivery he did not even consent to part with

[5] [1943] K.B. 458.
[6] At p. 446.

possession. It is only when this, the first hurdle, has been surmounted that we reach the second stage. It must now be proved that the accused person "took" the property *animo furandi*, that is to say, without a claim of right made in good faith, and with intent at the time of the taking permanently to deprive the owner thereof. This is the territory occupied by the two old common law phrases *cepit et asportavit* and *animo furandi*. We shall now endeavour to apply this approach.

Hurdle One: Invito Domino

The questions which must be answered are these—

(1) Did the owner or his servant or agent consent to part with the ownership or property in the goods or money? If so, it cannot be larceny, although there might be obtaining by false pretences or fraudulent conversion on suitable facts (situation I).

(2) If the answer to question 1 is no, then did the owner or his servant or agent consent to part with possession of the goods or money under a false pretence or representation? If yes, this constitutes larceny by trick (situation II).

(3) If the answer to question 1 and 2 is no, did the owner or his servant or agent consent to part with possession of the goods or money under a mistake of fact sufficient to negative the parting with possession. If yes, where there is knowledge on the part of the taker or receiver that possession has been so obtained, then by virtue of section 1 (2) (i) (*c*) of the Larceny Act, 1916, it will be simple larceny, and it will also be larceny if the facts are similar to those in *Ashwell*,[7] *Riley*[8] *or Hudson*[9] (situation III).

The tragedy of *Moynes* v. *Coopper* is that these questions relating to the first stage (Hurdle One) were never clearly articulated. If they had been, the case might have been more easily disposed of. As there was no false representation or pretence, the second question, relating to Larceny by Trick, is irrelevant, and the choice lies between situation I and situation III. If the wages clerk is regarded as having full authority to calculate and pay wages, the case may be disposed of by saying that by virtue of this authority he passed the ownership or property in the money to the defendant, in which case, despite the mistake, there could be no Larceny by Mistake, and as there is no false pretence, the only charge could be fraudulent conversion, provided of course that the requirement about "entrusting" could be interpreted to include

[7] (1885) 16 Q.B.D. 190.
[8] (1853) Dears.C.C. 149.
[9] [1943] K.B. 458.

this situation (situation I). If on the other hand, it is said that the wages clerk has no authority to pay the wrong sum of money to the defendant, and only parted with possession of the goods or money under mistake, we can then proceed to the second stage and consider whether there was a taking *animo furandi* by the defendant (situation III).

Hurdle Two: Cepit et Asportavit Animo Furandi

Assuming we have surmounted hurdle one, the question arises whether the defendant took the money with the intention of stealing it "at the time of the taking." Everything depends on precisely when the taking is regarded as having occurred, and on this we have the equivocal authority of *Ashwell* [10] and the controversial case of *Hudson*,[11] not to mention *Riley* [12] and *Ruse* v. *Read*.[13] It is difficult to see how one can get round *Hudson*, once one has reached this stage. It is submitted that there is no true ground of distinction between *Hudson* and the facts of the present case on the question of taking *animo furandi*. It is irrelevant to point back to the intent of the owner or his servant or agent, which is what the majority seek to do. Otherwise where do we stand in relation to the case of *Ashwell*? One way of interpreting the present decision is to regard the authority of *Hudson* as henceforth limited by the gloss or qualification that it does not govern the situation where the owner or his servant or agent intends to deliver the goods or money in question to the actual recipient. This leaves us with the necessity of drawing a cumbersome distinction which further enhances the technicality of this branch of the criminal law. It is submitted that once the question relating to the absence of the owner's consent is answered affirmatively (in question 1 it is formulated in terms of presence of consent and consequently in that form must be answered negatively) there can be only one answer to the question relating to the taking *animo furandi*, in the light of the present authorities, *viz.* that when the defendant first learned of the mistake and immediately decided to appropriate the money he was guilty of larceny. Of course, it is open to the courts to overrule the authorities, and it may be that this will come to pass. *Moynes* v. *Coopper* gives little more than a nod in that direction.

The minority judgment of Stable J., while it is a noble effort to be systematic and logical in the approach to this situation, suffers from the defect that it makes inappropriate use of a passage from Stephen J.'s judgment in *Ashwell* [14] to support the view that the separation in time between the delivery and the defendant's

[10] *Loc. cit.*, note 7.
[11] *Loc. cit.*, note 9.
[12] *Loc. cit.*, note 8.
[13] [1949] 1 K.B. 377.
[14] (1885) 16 Q.B.D. 190, at p. 216.

acquiring knowledge of the mistake is immaterial. Stephen J. would certainly not have subscribed to the view expressed by the learned judge at page 448 to the effect that "the time lag between his first getting possession of the pay packet and the *animus furandi* is immaterial." The point Stephen J. was making in the passage out of which Stable J. takes his quotation was that intention must be contemporaneous with the taking, and that it is for the jury to decide on all the evidence whether the intent is sufficiently contemporaneous. Furthermore the judgment is marred by the wholly irrelevant reference to mistakes which may occur in shooting at pigeons coupled with inadequate explanations of the distinctions in point, and also there is the misleading argument based on the *reductio ad absurdum* to the effect that whereas a finder might be guilty of larceny the defendant, according to the majority view, "gets off scot free." While one may have great interest in shooting wild pigeons and a strong desire not to let a dishonest person go free, there seems to be no reason for these digressions. Stable J.'s main arguments command more respect. First he says that, following *Middleton*, the wages clerk in this case only had a limited authority, which was to hand over the correct amount of wages, no more and no less, to the defendant. The mistake meant that there was no consent by the employers to the transaction or that the consent given was not true consent because it was given under a misapprehension of the true facts and in error. Secondly, on the taking *animo furandi*, the learned judge follows *Ashwell* and *Hudson*, and for good measure brings *Riley* in as well. His general conclusion is neatly expressed in the statement at page 450 to the effect that "the taking must be an act of the mind as well as of the hand." This judgment has more to commend it than the majority judgment, but as we have already said, it may be that the majority were right, but gave the wrong reason.

It is respectfully submitted that the judgment of the court holding that the defendant was not guilty of larceny was correct and that the reason which should have been given for this decision was that the wages clerk passed the ownership in the money to the defendant. It is also submitted that there were no grounds for distinguishing *Hudson* on the question of taking, and the question remains whether the interests of the criminal law are best served by perpetuating this and other leading decisions in the law of larceny or whether they should be reviewed.[15]

J. E. Hall Williams.

[15] I am greatly indebted to my colleague Mr. W. E. Denny, with whom I have discussed *Moynes* v. *Coopper* several times, and whose puzzlement about its effects has prompted me to write this piece. I gladly acknowledge the help he has given me.

Illegality in the Conflict of Laws

The implications of the decision in *Regazzoni* v. *K. C. Sethia (1944) Ltd.*[1] are so frightening that neither the unanimity of views expressed by Sellers J. in the court of first instance and by Denning, Birkett and Parker L.JJ. in the Court of Appeal nor this writer's very marginal concern with a particular, now irrelevant, aspect of the case can deter him from respectfully drawing attention to a remarkable development of English law.

In *Foster* v. *Driscoll*[2] it was laid down that an English contract is illegal and void "if the real object and intention of the parties necessitates them joining in an endeavour to perform in a foreign and friendly country some act which is illegal by the law of such country."[3] This rule was said to be derived from "our obligation of international comity as now understood" and from the fear that without it the foreign government would have "a just cause for complaint."[4] Whether international law knows of any such obligation or cause for complaint is a matter of considerable doubt. However this may be, in *Foster* v. *Driscoll* the Court of Appeal was careful to limit the decision to a case in which the contract *necessitates* the parties *joining* in an act to be done *in* a foreign country and illegal in that country, where, in other words, they agree to commit a conspiracy in the foreign country. This rule has now been extended so as to comprise the case in which "two persons agree together on a transaction which to their knowledge is intended to be carried out by means of *one or other of them* breaking the laws of a friendly country or *procuring or assisting another* person in the breach of such laws."[5] The plaintiff, a Swiss trading in Switzerland, buys certain goods from the defendant, an English limited company, "c.i.f. Genoa," the contract being made in Germany. The seller knows that the buyer will reship the goods at Genoa to South Africa. The buyer knows that the seller will obtain the goods from India. Both parties know that (as the Court of Appeal held) Indian law prohibits the direct or indirect shipment of Indian goods to South Africa. In these circumstances the contract is illegal, although (a) neither the contract nor either party to it is subject to Indian law; (b) the buyer does not do any act in India; (c) the buyer is under no contractual obligation to reship to South Africa; (d) the seller's acts done in India, not in any way referred to or ascertained by the court, must be assumed to be confined to placing an order with an Indian supplier for delivery at Genoa; (e) the Indian

1 [1956] 3 W.L.R. 79. Also reported in [1956] 2 All E.R. 487. It is understood that an appeal may be taken to the House of Lords [Ed.].
2 [1929] 1 K.B. 470.
3 At p. 521, *per* Sankey L.J.
4 At p. 510, *per* Lawrence L.J.
5 At p. 85, *per* Denning L.J.

supplier is apparently unaware of the ultimate destination of the goods. The contract is illegal, because parties in England and Switzerland have the "wicked intention" to overcome the ban upon exports from India to South Africa.

At a time when most countries have introduced export and import restrictions, systems of quota, exchange control, anti-trust laws, trade monopolies and numerous other regulations of all kinds, this country demands the international recognition and enforcement of these regulations merely by reason of the fact that to the knowledge of the contracting parties a third party, *viz.*, the seller's supplier, presumably innocently, commits a breach of *his* country's laws. For it is to be noted in the first place that the decision of the Court of Appeal does not and, indeed, cannot rest on the assumption that either the seller or the buyer were in any way subject to Indian law. Secondly, however, the decision does not rest on any finding that the seller had done anything dishonest, false or deceptive either in India or elsewhere. If the seller had been fraudulent *vis-à-vis* his supplier, the doctrine of *R.* v. *Newland* [6] could possibly be so stretched as to justify a finding that the intention to defeat the purpose of foreign legislation constituted a conspiracy in the same way as if English legislation had been in issue. But on the facts as reported the seller must be taken to have made merely the true statement that the goods were to be delivered c.i.f. Genoa. The only objection which could conceivably be raised against his conduct arises from his omission to disclose to his supplier in India the buyer's non-contractual intention to resell the goods to South Africa. It may be that Indian law imposed such a duty of disclosure upon the English seller. Even so, it remains puzzling how, under any principle of the conflict of laws or public international law, a legal system to which neither seller nor buyer was subject could impose such a duty. While English law may preclude the English seller from making a dishonest statement to the Indian supplier, it cannot possibly give such effect to Indian law as to render the contract with the Indian supplier a contract *uberrimae fidei* and to create a duty of disclosure unknown to English law.

The doctrine of the Court of Appeal seems to apply irrespective of the character and purpose of the foreign country's legislation. Hence anyone who thinks of Nazi or Communist laws, of their far-reaching international repercussions and their claims to international enforcement will be bound to read *Regazzoni's* case with a feeling of bewilderment. One also wonders how the decision will work out in the following, not wholly imaginary, case: X, a Jewish merchant in Manchester, needs Egyptian cotton. By Egyptian law the direct or indirect supply of Egyptian goods

[6] [1953] 2 All E.R. 1067.

to Jews is prohibited. Y, a merchant in London whom Egyptian law defines as "Aryan," can obtain Egyptian cotton. He agrees to do so and sell it to X, but fails to deliver it. Will X's action be dismissed on the ground that, as Denning L.J. put it,[7] "the courts of one country should not help to break the laws of another"?

Moreover, it seems that the doctrine of *Regazzoni's* case is also independent of the views which public international law may take of the foreign country's legislation. Is it certain that the Indian embargo on the shipment of goods from India to South Africa was consistent with international law? This is a difficult problem which cannot be discussed in the present context, but whoever studies the law on coercive methods (short of war) for settling differences between States will appreciate the grave nature of the problem.[8] If India herself had been guilty of an international delinquency, could it still be said that she could expect this country to give effect to and, indeed, to intensify it? But even if no such delinquency occurred and the point is considered simply from the point of view of "comity," was Denning L.J. wise in supporting his decision by the statement that a finding in the Swiss buyer's favour "would be a breach of the comity which should exist between countries and especially between countries of the British Commonwealth"? It is not unlikely that the Union of South Africa, another member of the British Commonwealth, will take a very different view of the demands of comity.

F. A. MANN.

DISTINGUISHING CASES AND THE LIMITS OF RATIO DECIDENDI

WHEN counsel finds himself confronted with an adverse proposition of law allegedly founded upon a precedent he may contend (i) that the proposition was but *obiter dictum*, or (ii) that it should be read in the light of the facts of the precedent case when it will be seen that the *ratio decidendi* was a narrower rule of law, or (iii) that the precedent can be distinguished from the instant case by virtue of its peculiar facts. The rationale of the practice of distinguishing cases has yet to be elaborated. An important beginning has been made by Bryan King in a footnote in which he speaks of "cases not distinguishable . . . by any consideration which in relation to the decision reached, *and on the current scale of accepted legal values*, is material."[1] A fuller development must

[7] p. 85.

[8] See, in general, Oppenheim (Lauterpacht), *International Law* (8th ed.), I, pp. 292, 293; II, pp. 111, 132 *et seq.*, or Stone, *Legal Controls of International Conflict*, pp. 285 *et seq.*

[1] *The Concept of Lawyer's Jurisprudence*, 11 Camb.L.J., p. 413, n. 26.

doubtless await the appearance of a comprehensive theory of precedent. We can, however, say at present that a procedure of rejecting propositions merely by distinguishing cases is juristically unsatisfactory: it is inadequate to point to distinctions between cases without referring to the principles which make those distinctions significant.

In *A. V. Pound & Co., Ltd.* v. *M. W. Hardy & Co. Inc.*[2] we have examples of all three methods being used by judges to reject a proposition of law laid down by Scrutton L.J. in *H. O. Brandt & Co., Ltd.* v. *H. N. Morris & Co., Ltd.*[3] Though *Pound's* case came before the House of Lords only one of their Lordships [4] based himself on the power of the House of Lords to overrule a "decision" of the Court of Appeal. The ensuing note examines this case from the point of view of the doctrine of precedent. Its commercial law aspects have already been considered in the preceding number of this *Review*.

In *Pound's* case it will be remembered the sellers, an English company, sold Portuguese turpentine in London to the buyers, an American firm, f.a.s. buyers' tank steamer at Lisbon. No provision was made in the contract about an export licence, which, by the law of Portugal then and subsequently in force, was required before turpentine could be exported and which had to be obtained by the supplier. The buyers chartered a tanker which proceeded to Lisbon, but the turpentine could not be shipped because an export licence was refused. (Perhaps because the buyers wished to export the turpentine to Eastern Germany.) In arbitration proceedings the sellers claimed damages for an alleged breach of contract by the buyers who had not taken delivery of the turpentine which the sellers had placed free alongside the ship in accordance with the contract. The arbitrators awarded damages to the sellers: the arbitration Board of Appeal held, subject to a special case, that the buyers were discharged by the refusal of the licence: McNair J., considering himself bound by *Brandt's* case, restored the arbitrators' award: the Court of Appeal allowed the appeal from McNair J., the headnote in the All E.R. reading that *Brandt's* case was distinguished: and, finally, the House of Lords affirmed the decision of the Court of Appeal, the headnote reading "Dictum of Scrutton L.J. . . . criticised."

The proposition of law on which the buyers relied was that in an f.a.s. or f.o.b. contract for the sale of goods, it is for the buyer to obtain an export licence if one is required: all the seller has to do is to deliver the goods alongside or on board the ship procured by the buyers. *Brandt's* case was said to be the authority for this proposition. In particular, the proposition was said to be laid down by Scrutton L.J. in the following dictum: "The buyers

[2] [1956] 1 All E.R. 639, also reported in [1956] 2 W.L.R. 683.
[3] [1917] 2 K.B. 784.
[4] Viscount Simonds at pp. 645E and 648D.

must provide an effective ship, that is to say, a ship which can legally carry the goods. When the buyers have done that the sellers have to put the goods on board the ship. If that is so the obtaining of a licence to export is the buyers' concern."

In *Brandt's* case English merchants sold aniline oil to English merchants f.o.b. Manchester. Subsequent to the contract an order was made requiring a licence to be obtained for the export of aniline oil. The sellers applied for a licence and when it was refused did not deliver the goods, and they were sued for breach of contract by the buyers. The buyers failed in their action.

In the Court of Appeal in *Pound's* case [5] the principal technique employed was that of pointing to the differences between the facts of *Brandt's* case and *Pound's* case. Said Singleton L.J.[6]: "In the one case the contract was an f.o.b. contract; in the other it is an f.a.s. contract." He added: "I do not think that of itself is of much help." Lord Goddard said that difference was "immaterial." [7] Only in the House of Lords is there a hint of the reason why the difference is insignificant. Viscount Simonds points out [8] that if the duty to obtain an export licence fell on the buyer in an f.o.b. contract, then it would do so *a fortiori* in an f.a.s. contract. The duty of a seller is less in the latter than in the former. Perhaps the most succinct statement of the "material differences" between the two cases is to be found in Lord Goddard's judgment.[9] "In *Brandt's* case the contract was between two English companies for the sale of goods in England and was made at a time when an export licence was not required. Subsequent legislation required a licence to be obtained. As the buyers knew to what country they wanted the goods shipped, it was for them to obtain a licence . . . In this case the contract was made in England for shipment of goods from Portugal, where at the time the contract was made, Portuguese law required an export licence before the goods could be put alongside. A further requirement of Portuguese law was that the only persons who could get a licence were the persons who supplied the goods to the sellers." In the House of Lords Viscount Kilmuir's list of the facts to remember when comparing *Brandt's* case with other cases draws attention to similar differences.[10] It is, however, difficult to see the relevance of all the distinctions, for example, that of the date when licensing system comes into operation. Lord Goddard himself says the "vital distinction" is that Portuguese law required the seller in *Pound's* case to obtain a licence which would enable the goods to be put alongside. Romer L.J. says "The most

[5] *M. W. Hardy & Co. Inc.* v. *A. W. Pound & Co., Ltd.* [1955] 1 Q.B. 499; [1955] 1 All E.R. 666.
[6] 671G.
[7] 674C.
[8] 648D.
[9] 674B.
[10] 643C.

important element of difference" is that the sellers in *Pound's* case were the only persons who in fact could have applied for the licence. Singleton L.J. also in effect made this the basis of his judgment.

The doctrine that judgments have to be read *secundum subjectam materiam* was not entirely overlooked in the Court of Appeal [11] but it was most fully developed in the House of Lords. Viscount Kilmuir said "I cannot extract from *Brandt* v. *Morris* a general rule that, on every f.o.b. or f.a.s. contract, the buyer must supply a ship into which, or alongside which, the goods can legally be placed where there exists a prohibition on export except with a licence." [12] "The decision in *Brandt* v. *Morris* is authority only for the proposition that, where a British buyer has bought goods for export from Britain, and a British prohibition on export with a licence supervenes, then there is a duty on such a buyer to apply for a licence, because not only is he entitled to apply to the relevant British authority but he alone knows the full facts regarding the destination of the goods." [13] Lord Somervell, referring to a passage from the judgment of Scrutton L.J. containing the dictum already quoted, said: "These observations, if general, must be confined to cases where both parties are within the jurisdiction of the licensing authority." It is important to note that Viscount Kilmuir's narrowing of the general proposition was derived from a consideration of the context of the dictum of Scrutton L.J. He was able to infer that Scrutton L.J. was not himself purporting to lay down the general rule on which the sellers relied. Scrutton L.J. preceded the quoted dictum by a sentence beginning "In this case it becomes necessary to go further and to decide whether in this f.o.b. contract the obligation . . ." Viscount Kilmuir said "significance must be attached to the words in this f.o.b. contract," thereby suggesting that Scrutton L.J. expressly indicated that his dictum applied only to cases like *Brandt's* case. It is not so easy to see that Lord Somervell's limitation is derived from a process of interpretation of the judgment of Scrutton L.J. He commenced his reference to the judgment of Scrutton L.J. by saying: "The sellers seek comfort from certain observations of Scrutton L.J. These observations must be read in the context of the facts." [14]

Lord Somervell had, moreover, already reduced the observations of Scrutton L.J. to the status of *obiter dicta*. He pointed out that in *Brandt's* case what was in issue was whether the sellers were in default, so that statements about the liability of the buyers were not necessary. "There was no counterclaim, and the court did not decide that the buyers would have been liable in damages, if

[11] See Singleton L.J. at 673H and Romer L.J. at 675I.
[12] 644C.
[13] 643D.
[14] 649I.

having applied a licence had been refused. The decision does not, therefore, assist the sellers." [15] Viscount Simonds referred to this same point, but with some hesitation though more explicitly. "It is proper to note that just as in this case it is not primarily the seller's obligation which has to be determined, so, in *Brandt* v. *Morris* it was not primarily the buyer's obligation, and to that extent—perhaps a limited extent—the observations of Scrutton L.J. on the latter's obligations may be regarded as *obiter*." The doubt, it is submitted, is well justified, for if one accepts the view that a proposition which forms a link in the chain of reasoning of a judge is *ratio* then the observations of Scrutton L.J. were not *obiter*. In order to determine what was the seller's obligation, he considered what the buyer's obligation was. It was because he considered that the buyer was under an obligation to obtain the licence that he concluded that the buyer had no right of action against the seller.[16]

Viscount Simonds entered on an examination of the merits of the dictum of Scrutton L.J. He found himself unable to assent to the proposition there affirmed, because the argument which purported to demonstrate that "the obtaining of a licence to export is the buyers' concern" was fallacious. Scrutton L.J. asserted that the proposition followed as a conclusion from the premise that "The buyers must provide an effective ship, that is to say, a ship which can legally carry the goods." But Viscount Simonds points out "It appears to me to beg the question to state that it is the duty of the buyer to provide an 'effective ship,' meaning thereby a ship which can lawfully carry the contract goods to a named destination. It is equally the duty of the seller to deliver f.o.b. or f.a.s. 'effective goods,' meaning thereby goods which can lawfully be carried to that destination." [17] This is an interesting illustration of the way in which the analytical lawyer, who condemns "well-meaning vagueness" and produces definite rules which are often evaluated as "logically" determined, may sometimes be shown to have employed a pseudo-logic and to have sacrificed the greater utility of comprehensiveness and justice for the lesser utility of mechanical precision.

What rule of law is established by *Pound's* case? All the members of the House of Lords rejected the general rule for which the sellers contended. Since current terminology calls a negative proposition a rule of law, it can be said that one rule of law established by *Pound's* case is that there is no rule that where goods are sold by a contract calling for their shipment, and a licence is required for their export, then it is always the buyer's responsibility that a licence be obtained. But is there any positive rule of law?

[15] 649H.
[16] Further discussion of this aspect of the distinction between ratio and dictum can be found in 2 West Aust.L.J., pp. 512 *et seq.*
[17] 648E.

Lord Somervell reports: "The sellers invited your Lordships to lay down some general rule." [18] Viscount Simonds refused to do so:—"these are matters which do not arise for consideration on the present appeal." [19] Lord Somervell however said "There can be no general rule." [20] In other words he thought that the existence of obligations to endeavour to obtain a licence and the consequences of failure to obtain one must depend on general principles of contract as applied to the particular circumstances of each case. This flexible doctrine is to me an attractive one; it would be instructive to find out by an appropriate questionnaire what St. Mary Axe and the Temple thinks of it. But it is not even the *ratio decidendi* of Lord Somervell's speech.

J. L. Montrose.

Breach of Statutory Duty—Proof of Causation

In *Bonnington Castings Ltd.* v. *Wardlaw* [1] the House of Lords made firm the elements of initial liability in the tort action for breach of statutory duty.

A foundry worker contracted pneumoconiosis in the course of his employment. At his place of work he was exposed to silica dust emanating from the pneumatic hammer and swing grinders with which he worked. No dust extraction plant was known or practicable for use with the hammer, so that no breach of duty occurred in that respect. But, a breach of statutory duty was, under the relevant regulations, committed by the employer in respect of the swing grinders, the dust extraction plant for which was not kept free from obstruction as it should have been. It was clear that silica dust from both the hammer and the grinders had been inhaled by the worker over a period of eight years, but it was impossible to prove the proportions for which each machine was responsible: it was only probable that each contributed to the atmosphere of the workplace roughly the same amount.

The House of Lords laid down that the elements of initial liability which the plaintiff must establish in an action for breach of statutory duty are, similar to those for the tort of negligence, threefold: the plaintiff must show the existence of the relevant statutory duty, prove that a breach of it occurred and that "on a balance of probabilities the breach of duty caused or materially contributed to his injury" [2]; it being added that, "A contribution

[18] 650E.
[19] 648G.
[20] 650E.
[1] [1956] 2 W.L.R. 707; [1956] 1 All E.R. 615.
[2] 711.

which comes within the exception *de minimis non curat lex* is not material, but . . . any contribution which does not fall within that exception must be material." [3] It was held that, on the facts, the plaintiff had succeeded in discharging this onus of proof of sufficient causation.

Ten years previously, the Court of Appeal in *Vyner* v. *Waldenberg* [4] had enunciated a different rule of proof of causation as follows: "If there is a definite breach of a safety provision imposed on the occupier of a factory, and a workman is injured in a way which could result from the breach, the onus of proof shifts onto the employer to show that the breach was not the cause." This legal presumption of a causal nexus in appropriate circumstances was later hardly sustained by the Court of Appeal in *Watts* v. *Enfield Rolling Mills*,[5] when the burden on the plaintiff was described as being that: "He must show that his injury was caused by the relevant danger, *i.e.*, by the danger against which Parliament intended to guard him . . . When that is proved or admitted, then the second thing which the plaintiff must show is that there was a breach of a statutory duty which was intended to guard against that very danger. When both those matters are proved, the proper inference is that the breach was the cause of the injury unless the occupier proves that it was not." [6]

The rule in *Vyner* itself has now been overruled by the House of Lords, and the modification of it (if it was only that) in *Watts* has also been cast out, sympathy being expressed for the predicament of the Court of Appeal in the latter case, who, Lord Reid remarked, "being powerless to overrule a previous decision of that court, were driven to find distinctions which do not appear . . . to be satisfactory, and which I doubt whether they would have adopted if they had been convinced of the validity of the general rule." [7]

Of course, this new decision of the House of Lords in the law of industrial injuries gives a workman plaintiff a smaller chance of success than the rule in *Vyner* would have conferred on him. But, fortunately, the diminution exists largely in the realm of theory, since the difference in the practical effects of the two rules of proof of causation comes to a head only in the relatively uncommon kind of situation like that in *Watts* v. *Enfield Rolling Mills*.

Nonetheless, in its wider perspective, *Bonnington Castings Ltd.* v. *Wardlaw* is another example of the judicial inclination that has emerged in the 'fifties to modify the sympathetic attitude

[3] 712.
[4] [1946] K.B. 50, 56.
[5] [1952] 1 All E.R. 1013.
[6] At 1017.
[7] 711.

towards injured or injuring workmen that was such a marked characteristic of master and servant cases in the preceding twenty years. How far the courts are prepared to go, at least at Court of Appeal level, where it was the workman who did the injury in the course of his employment, has been shown recently in the grave decision of *Romford Ice & Cold Storage Co.* v. *Lister*.[8] How far they may now be prepared to carry their revised outlook where the workman is himself injured in his employment will probably be tested when suitable litigation occurs involving the defence of delegation of statutory duty.

C. Grunfeld.

A Tortfeasor's Charter?

It seemed that we really had begun to tidy up our legal rules relating to occupier's liability. But as one horror is bundled out of the front door another sneaks in at the back. The latest intruder, who bears some resemblance to our old enemy *volenti non fit injuria*, made his entry in *Ashdown* v. *Samuel Williams & Sons Ltd.*[1]

The first defendants were the owners of a dock estate. In 1927 they leased to the second defendants a factory on the estate entirely surrounded by property which they retained. An express right of way to the factory was granted in the lease but, to the knowledge of the first defendants, an additional short-cut had always been used by the employees of the second defendants. When the latter engaged the plaintiff as a cleaner they showed her the short-cut and told her she could use it. While walking down it she was seriously injured as a result of shunting operations negligently undertaken by the first defendants.

Havers J. (in a reserved judgment) held that the plaintiff was a licensee of the first defendants who, prima facie, were liable to her for their negligent operations. However, the first defendants had posted notices disclaiming liability for injury however caused and whether or not due to negligence on the part of the first defendants or their tenants, servants or agents. At least one of these notices had been seen by the plaintiff, although she had not read it all—not surprisingly because it was of considerable length and expressed in the most turgid legal phraseology. The learned judge held that since the plaintiff was aware, or had good reason to be aware, that the notice was intended to affect her rights as regards the user of the land she was bound by it (*Parker* v. *S. Eastern Ry.*[2]) and must be regarded as a licensee

[8] [1955] 3 W.L.R. 631.
[1] [1956] 3 W.L.R. 128. Also reported in [1956] 2 All E.R. 384.
[2] (1877) 2 C.P.D. 416—the famous old "ticket case."

upon the terms of the notice. Since this expressly disclaimed liability for negligence she had no remedy against the first defendants.

The results of this decision seem startling. Can I effectively escape liability for the negligence of myself and my servants (if I had any) by putting a similar notice on my gate? Can I then safely release my enchained Alsatian, which has already bitten two postmen and the butcher boy, and relax parental discipline over my (hitherto) frustrated children, encouraging then to construct an ice rink on the front path and a rifle range in the front garden? If so, my insurance company will presumably soon insist on my putting up such a notice—on everybody putting one up. If I print the notice on the back of my party invitation cards can I, with impunity, mix the cocktails with reckless disregard of the (literally) poisonous results that may be produced? Is the decision limited to licensees, so that I shall still be liable to tradesmen who are invitees? Why should it be? So far as active operations are concerned, these distinctions are irrelevant [3]; they relate only to the static condition of the premises and may not mean much even then.[4] In any case, these distinctions will shortly be abolished for all purposes.[5] True the position may be different as regards those entering as of right—I may still be in a weak position as regards the man who comes to read the gas meter or the sheriff's officer. But as regards those who can only enter lawfully with my permission, I am, presumably, entitled to qualify my permission in the same way as the defendants did here. A factory owner might even be able to reintroduce the doctrine of common employment—and extend it to cover a faulty system of work—by putting up notices disclaiming any liability for his or his employees' negligence.[6] If the learned judge is right, the possibilities seem endless and horrifying.

[3] *Dunster* v. *Abbott* [1954] 1 W.L.R. 58; [1953] 2 All E.R. 1572, C.A.; *Hawkins* v. *Coulsdon & Purley U.D.C.* [1954] 1 Q.B. 319, C.A.; *Slade* v. *Battersea & Putney Hospital Management Committee* [1955] 1 W.L.R. 207; [1955] 1 All E.R. 429. *Slater* v. *Clay Cross Co.* [1956] 3 W.L.R. 232; [1956] 2 All E.R. 625, C.A. See (1954) 17 M.L.R. 265 and (1955) 18 M.L.R. 395.

[4] *Hawkins* v. *Coulsdon & Purley U.D.C.*, *supra*, *Slater* v. *Clay Cross Co.*, *supra*. "The Law Reform Committee has recently recommended that the distinction between invitee and licensee should be abolished; but this result has already been virtually attained by the decisions of the courts": *per* Denning L.J. at [1956] 3 W.L.R., p. 235.

[5] The Occupiers' Liability Bill, see below, gives effect to the recommendations of the Law Reform Committee by introducing a "common duty of care" owed to all who enter premises ("premises" including vehicles and the like) with the occupier's permission.

[6] It might be argued that this is different from the other illustrations in that there is a contractual relationship between the employer and employee so that the employee clearly cannot, by unilateral act, renounce his contractual duties. But the notice might be incorporated into the contract, as in *Parker's* case. Or, if it only related to certain parts of the factory (for example, the lavatories, canteen, or, perhaps, certain particularly dangerous areas), it might be regarded as falling completely outside the ambit of the contract; *cf. Cosgrove* v. *Horsfall* and *Wilkie* v. *L.P.T.B.* considered below. In the

It is respectfully submitted that he cannot be right, and that he has confused a number of different rules that need to be kept separate. If, as in *Parker's* case,[7] the claim is in contract, the contract is necessarily subject to any exempting terms in the contract, and this may include those in notices. But in the case before him there was no contract between the plaintiff and the first defendants, and her claim was in tort and tort alone. Had there been a contract it might have exempted the defendants even though the claim was pleaded in tort,[8] but that cannot be so where there is no contract. The use of the term "licence" may be partly responsible for the confusion; for a licence often is contractual, but it certainly was not here. To a claim in tort there were only four possible ways in which the notice might be relevant:

1. It might have shown that the plaintiff was not a licensee but a trespasser. But to do this it would have had to forbid admission, and this it certainly did not.[9] If the plaintiff was lawfully on the defendant's premises they owed her a duty of care as a matter of law and could not effectively disclaim that duty by unilateral declarations. It is contradictory to treat her as a licensee but then to hold that no duty was owed to her, thus equating her with a trespasser.

2. The notice might have been an adequate way of discharging the defendant's duty by warning the plaintiff of the risk. But this could only be so as regards the static condition of the premises —not as regards active operations being carried on by them. They could not discharge their duty to shunt carefully by putting up a notice saying "Warning—careless shunting," any more than a car driver can discharge his duty to drive carefully by fixing a loud-speaker to his car which heralds his approach by bellowing, "Get off the road, I'm a careless driver."

3. It might have brought into operation the doctrine of *volenti non fit injuria*. But hitherto the conditions limiting that doctrine

Cosgrove and *Wilkie* cases the exemptive conditions on the free passes were expressly limited to circumstances where the employee was not travelling on the employer's business. Would the legal position have been different if they had not been so limited and the employees had been travelling on business? If so, does it not emphasise the anomalies of the present position? Why should it be easier to disclaim duties imposed by the general law than those voluntarily assumed by contract?

7 (1877) 2 C.P.D. 416.

8 See the summary discussion in (1954) 17 M.L.R. at 156–157 and add *Adler* v. *Dickson* [1955] 1 Q.B. 158, C.A.

9 Contrast the notice of the cab of the lorry in *Twine* v. *Bean's Express* [1946] 1 All E.R. 202 affirmed 175 L.T. 131, 62 T.L.R. 155. This clearly did forbid entry, but that does not solve the difficulties inherent in the decision, for the owner's servant knew of the presence of the unlawful passenger and therefore presumably owed him a duty of care. The grounds of the decision in the court of first instance are strongly criticised by Professor Newark in (1954) 17 M.L.R. 102 and appear to be based upon a theory of vicarious liability explicitly rejected by the H.L. in the recent case of *Staveley Iron & Chemical Co.* v. *Jones* [1956] 2 W.L.R. 479.

have been strict, and clearly they were not fulfilled here. The plaintiff had not absorbed the terms of the notice, and, even if she had, mere knowledge of the risk is not equivalent to voluntarily assuming it. That the Court of Appeal are not prepared to relax these conditions is shown by the even more recent case of *Slater* v. *Clay Cross Co. Ltd.*[10] There the defendants had allowed the public to walk through a tunnel on their railway track. The plaintiff, while doing so, was run down because of the failure of the defendants' servants to keep a proper look out, to slow down, and to give warning of the train's approach. The court held [11] that the defence of *volenti* did not apply, notwithstanding that she knew that walking through a railway tunnel was necessarily attended with risk. Can it seriously be contended that the decision would have been different had there been a notice at the entrance to the tunnel disclaiming liability?

4. The notice would clearly have been a factor in contributory negligence, but that would merely have reduced the damages recoverable and not have barred recovery altogether.

Hence it is submitted that on the facts as found the plaintiff should have recovered from the first defendants. Unfortunately there is unlikely to be an appeal on this point for, as we shall see, she did in fact recover against the second defendants, her employers.

Even more unfortunately, there is some Court of Appeal authority (which was not cited) which seems to support the learned judge. The two cases of *Cosgrove* v. *Horsfall* [12] and *Wilkie* v. *L.P.T.B.*[13] concerned free travel passes granted to employees of bus companies.[14] These passes contained conditions similar to those in the case under discussion. In the first case the plaintiff sued, not the bus company, but the negligent driver, and it was held that the exempting condition could not be relied on by the latter,[15] though it seems to have been assumed that the condition would have barred his remedy against his employers. In the second case (in which the first was, apparently, not cited) action was brought against the employers and failed. Had Wilkie been travelling under a contract of carriage the condition would have been void by virtue of the Road Traffic Act, 1930, s. 97, but the court held that the pass was not a contract but a mere licence. In the words of Greene M.R.:

[10] *Supra.*
[11] Following *Dann* v. *Hamilton* [1939] 1 K.B. 509.
[12] (1945) 175 L.T. 334, C.A.
[13] [1947] 1 All E.R. 258, C.A.
[14] I am indebted to my colleague, Mr. C. Grunfeld, for reminding me of these cases. Perhaps they were better forgotten.
[15] In this respect the case was followed and approved in *Adler* v. *Dickson, supra.* So that if, in the present case, Mrs. Ashdown had sued the careless engine-driver she would presumably have succeeded.

> "It is clearly nothing but a licence subject to conditions, a very common form of licence, *e.g.*, a licence to enable a neighbour to walk over a field provided he does not go with a dog . . . It is a mere grant of a revocable licence subject to a condition that, while the licence is being enjoyed, certain consequences shall follow." [16]

But, with the greatest respect, there is all the difference in the world between the type of "condition" in each of these sentences. Obviously I can make my permission subject to a condition that the licensee shall not take a dog. If he does, he ceases to be a licensee and becomes a trespasser. It by no means follows, however, that I can effectively make my permission subject to a term that although the licensee remains a licensee I shall not be subject to the liabilities of a licensor. For reasons already stated, it is submitted that I can only do so if the licensee has contracted to release me from these obligations. Actually it is arguable that Wilkie had done precisely that; there was a contract of service between him and the Transport Board and the pass was granted to him as a normal incident of the service.[17] But the court was so anxious to take the case outside section 97 of the Act that they insisted that there was nothing contractual about it.[18] By so doing they unhappily afford some support for the learned judge's decision in the present case.

The Occupiers' Liability Bill, designed to implement the recommendations in the Law Reform Committee's Third Report [19] is now before Parliament, but if it is enacted in its present form it will not, as I see it, do anything to clarify the law on the question under discussion. The general scheme of the Bill seems to assume that the occupier's duty can only be excluded by contract (Clause 3), though it may be discharged by a warning, if this is "enough to enable the visitor to be reasonably safe" (Clause 2 (4) (a)). The application of the "volenti" principle is expressly stated to depend on "the same principles as in other cases in which one person owes a duty of care to another" (Clause 2 (5)). So far, there is nothing to suggest that there can be this novel kind of conditional licensee to whom no duty is owed. But, in Clause 2 (1), there is a cryptic reference to the occupier's power to modify or exclude his duty "by agreement *or otherwise*." [20] Presumably,

[16] [1947] 1 All E.R. at p. 260.

[17] This is brought out in the fuller statement of the facts in the report of the case at first instance: [1946] 1 All E.R. 150.

[18] *Quaere* was this necessary? All they needed to hold was that he was not being carried under "any contract for the conveyance of a passenger. . . ." The pass probably was not a contract to convey, for it was revocable. But there could still have been a term of the contract of service that the defendants should not be liable for injuries ensuing while he was using it to be conveyed. It is submitted that *Wilkie's* case could be distinguished on this basis.

[19] Cmd. 9305.

[20] The full clause reads: "An occupier of premises owes the same duty, the 'common duty of care,' to all his visitors except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise."

therefore, the courts will be free to follow the *Ashdown* decision. It is greatly to be hoped that attention will be given to this matter before the Bill is finally enacted.

The decision on the liability of the second defendant also raises an interesting and novel point. On the face of it her case against them was weak, for she had not arrived at the place of work when the accident occurred and therefore had not reached the place where an employer's duties normally begin to operate. But the learned judge held that, as the employers' place of work was entirely surrounded by private land, it was their duty to take reasonable care to ensure that a reasonably safe means of access was provided. Here the right of way was doubtless reasonably safe, but the employers could not rely on that for they had drawn the plaintiff's attention to the short-cut and told her she might use that. Hence they had to take reasonable steps to make that safe also. This duty, in his Lordship's view, might have been discharged by warning her of the dangers of the short-cut but having failed to do even that they were liable.

This, if I may say so, seems very sensible as a general proposition of law but produces further anomalies in the particular circumstances of this case. It is hardly satisfactory that the first defendants, whose moral responsibility was clearly the greater, should escape while the employers should be held liable. But over and above that, why could *they* not rely on the notice as an adequate warning? If the judge was right in holding that the plaintiff must be deemed to be on the land on the terms of the notice, surely this operated for the benefit of the second defendants as well as the first? What point was there in duplicating a warning adequately given by someone else.[1]

Finally, the decision may be drawn to the attention of Messrs. Hart and Honoré [2] to add to their collection of queer cases on causation. The learned judge held first that the "accident and injury were caused by" the first defendants' negligence (p. 136). Later he held that the negligence of the second defendants was "the cause" of the accident (p. 138)—because, if they had warned her, she might not have used the short cut. This seems to ring the death knell on the hitherto popular distinction between *causa causans* and *causa sine qua non*—it will not be mourned. Since the damages were reduced because of the plaintiff's contributory negligence, we have a judicial decision that a single accident was caused by the independent negligence of *three* distinct parties. Is this a record?

L. C. B. G.

[1] Unless it can be argued that a disclaimer of liability for negligence is not equivalent to a warning of danger.

[2] See "Causation in the Law," (1956) 72 L.Q.R. 58, 260, and 398.

Company Law—Minority Stockholders' Suits

It is not often these days that the rule in *Foss* v. *Harbottle* is invoked, successfully or otherwise. Indeed, since the Court of Appeal reviewed the rule and its many exceptions in *Edwards* v. *Halliwell*,[1] it does not seem to have been pleaded in company litigation, notwithstanding that there have been cases where it might have been possible to do so. Some of us therefore thought, and, perhaps, hoped, that the rule might be moribund. The recent case of *Pavlides* v. *Jensen* [2] shows how wrong we were.

In 1936 the Tunnel Asbestos Cement Co. Ltd. (Tunnel) had acquired a mine in Cyprus for about £142,000. In 1947 the company resold it for about £182,000 to another company in which Tunnel held 25 per cent. of the issued capital. This sale was carried out by the directors of Tunnel and not submitted to the approval of a shareholders' meeting. Tunnel's share capital was divided into ordinary shares and non-voting deferred shares. Ninety-six per cent. of the ordinary shares and a majority of the deferred shares were held by a parent company with a board of directors the majority of whom were the directors of Tunnel.

Sir George Pavlides, the holder of nearly 2,000 deferred shares in Tunnel, commenced an action against Tunnel and its directors alleging that the directors had been grossly negligent in the resale of the mine which, he said, was worth "somewhere in the neighbourhood of £1,000,000." The defendants applied for the preliminary determination of the point of law whether the action was maintainable by the plaintiff.

It will be observed that the alleged wrong was one done to the company, Tunnel, and not a wrong to the plaintiff shareholder personally. Prima facie, therefore, it is clear that Tunnel was the proper plaintiff and that the rule in *Foss* v. *Harbottle* precluded an action by an individual shareholder. However, it was equally clear that the prospect of Tunnel resolving to bring such an action was, to say the least of it, remote. Its board of directors could hardly be expected to resolve to bring proceedings against themselves. Nor was it likely that a resolution directing the institution of an action would be passed by a general meeting. At any such meeting the parent company had complete voting control and the board of the parent company was dominated by the directors of Tunnel. In any case, Sir George, as a deferred shareholder, had no means of convening an extraordinary general meeting and no vote at the Annual General Meeting. For all practical purposes, therefore, it was clear that no action would be brought unless a minority shareholder was allowed to do so.

It is well established that in certain circumstances such an action is maintainable at the instance of a minority stockholder

[1] [1950] 2 All E.R. 1064.
[2] [1956] 3 W.L.R. 224; [1956] 2 All E.R. 518.

provided (a) that he sues in a representative capacity on behalf of himself and all other shareholders (except the real defendants)[3] and (b) that he joins the company, on whose behalf the action is really being brought and for whose benefit any judgment will enure, as a defendant.[4] This Sir George had done. The question, therefore, was whether the facts of the present case brought it within the bounds in which this type of equitable relief is available.

The learned judge (Danckwerts J.) held that they did not. Although certain dicta in earlier cases[5] had suggested that the *Foss* v. *Harbottle* rule never applied where the interests of justice required the rule to be dispensed with, it had invariably been applied in cases where what was complained of was something which could have been validly done or ratified by a simple majority at a general meeting.[6] Here, in the absence of any allegation of *ultra vires* or fraud, the company in general meeting could have resolved to sell its assets at any figure it thought fit or have resolved to ratify the act of the directors or not to take proceedings against them for negligence. Hence *Foss* v. *Harbottle* barred the action.

This made it unnecessary for the judge to reach any final conclusion on whether the directors of Tunnel had such control as to require (in an appropriate case) the allowance of an action by a minority shareholder. Whether this second requirement (of control by the real defendants) always has to be fulfilled is not clear, but it certainly seems to be necessary when what is alleged is not an action *ultra vires* the company but a breach of the directors' duties to the company. While conceding that it must sometimes be permissible to go behind the apparent ownership of shares in order to discover whether a company is really controlled by the alleged wrongdoers, the learned judge said that he was not satisfied that here the directors were in such control. His argument was that it would be open to the shareholders in the parent company to disagree with the decision of their board if they refused to vote in favour of bringing proceedings. This, with respect, seems a somewhat unrealistic argument. In the light of

[3] On the face of it this is anomalous, for the action is not really being brought on behalf of the shareholders but on behalf of the company itself. Though never very clearly expressed in the English cases, the purpose of the requirement seems to be to ensure that all shareholders are bound by the result of the action, thus preventing a multiplicity of suits by one shareholder after another.

[4] Since it will not agree to be a plaintiff, it is perforce joined as a defendant instead; so long as the company is before the court justice can be done. *Cf.* equitable assignments when the assignor refuses to sue on the assignee's behalf.

[5] Notably those of Jessel M.R. in *Russell* v. *Wakefield Waterworks Co.* (1875) L.R. 20 Eq. 474.

[6] One of the reasons for the *Foss* v. *Harbottle* rule is the futility of allowing an action to be brought to redress a wrong which would cease to be a wrong if ratified in general meeting: see, *e.g.*, *MacDougall* v. *Gardiner* (1875) 1 Ch.D. 13, C.A.

the authorities it is doubtful whether in law it would be possible for shareholders effectively to disagree with the decision of the directors as to how shares in a subsidiary company should be voted at the latter's general meeting. This surely is essentially a question of management delegated to the board of directors and immune from interference by the general meeting.[7] Probably all that the shareholders in the parent company could do would be to dismiss the board after special notice in accordance with section 184 of the Companies Act, 1948. In any event, whatever the legal position the chance of the decision of the board being effectively rescinded in time to be effective is remote in the extreme.[8] Had there been an allegation of fraud in the present case it seems deplorable if the directors could still have sheltered behind the *Foss* v. *Harbottle* rule.

Since the plaintiff based his pleadings solely on an allegation of negligence, the decision on the first ground appears to be inevitable in the present state of the authorities. But this raises a number of questions. Accepting, as we must for the purpose of the preliminary procedural point, that the plaintiff's allegations were true, was this merely a case of negligence giving rise to a cause of action which could be waived by the company in general meeting? The directors must be taken to have disposed of £1,000,000 worth of the company's assets for under £200,000. Can a company give away its assets in this way even by a resolution in general meeting?[9] And even if a general meeting can, surely the board of directors cannot, even if they act in good faith?[10] Yet the practical effect of the decision is to allow this to be done. For while the company remains a going concern it is practically impossible for any action to be taken. If a stockholders' suit is barred, there is no other remedy unless and until

[7] See *Automatic Self-Cleansing Filter Syndicate* v. *Cuninghame* [1906] 2 Ch. 34, C.A., *Quin & Axtens* v. *Salmon* [1909] A.C. 442, H.L., *Shaw & Sons (Salford) Ltd.* v. *Shaw* [1935] 2 K.B. 113, C.A., *Scott* v. *Scott* [1943] 1 All E.R. 582. It may be conceded that this rule would not preclude a general meeting from resolving that the company should take proceedings against its directors. But that is not the present case, which relates to the question how the parent company should exercise its votes at a meeting of the subsidiary.

[8] The independent shareholders in the parent company might not know of the resolution to be proposed at the meeting of the subsidiary. Even if they did, it will take them over five weeks to convene an extraordinary general meeting of the parent company (Companies Act, 1948, s. 132). By this time the meeting of the subsidiary will be over. I know of no grounds upon which the result of the meeting could subsequently be reversed except by the laborious expedient of convening a second meeting, involving another five or six weeks' delay.

[9] *Cf. Hutton* v. *West Cork Ry.* (1883) 23 Ch.D. 654, C.A.

[10] *Cf.* the *Savoy Hotel* case and Mr. Milner Holland's report thereon (H.M.S.O., 1954) and the comments in (1955) Cam.L.J. 37 and in (1955) 68 Harv.L.R. 1176. Suppose that in the *Savoy* case the "Worcester Scheme" had not been ultimately dropped. Does it mean that no action could have been taken against the directors who, after Mr. Samuel sold out to them (at a handsome profit), had complete control?

the company is wound up or passes under other control—by which time the claim may be statute-barred. It is pretty clear that an isolated transaction such as this cannot be regarded as a course of oppressive conduct which will sustain an application under section 210 of the Act [11] or a petition for winding up under section 222 (*f*). And these remedies are the only alternatives.[12]

This prompts the final question which brings us back to the point from which we started. Is it not, perhaps, time that the rule in *Foss* v. *Harbottle* was decently interred? The duties of directors, certainly as regards care and skill, are not unduly onerous. Is it necessary virtually to nullify them by placing these procedural obstacles in the way of their enforcement? Surely in the English courts the burden of costs is a sufficient restraint on frivolous or blackmailing suits? And as for the substantive aspects of the rule, is it right that directors should be able to have their wrongs righted by exercising their voting control at a general meeting? Is there not something to be said for adopting the suggestion which James L.J. made as long ago as 1879,[13] that those shareholders whose personal interests or conduct are involved should be compelled to refrain from voting?

L. C. B. G.

PLAIN WORDS AND GOOD FAITH

AT one time the validity of orders for the compulsory purchase of land was challengeable only by means of applications for prerogative writs and actions for damages and equitable remedies. In recent years a special statutory procedure has been substituted for the old forms of proceedings. The grounds for challenging most classes of compulsory purchase orders are now contained in the First Schedule to the Acquisition of Land (Authorisation Procedure) Act, 1946. Paragraph 15 of the Schedule provides that any person aggrieved by a compulsory purchase order may question its validity within a period of six weeks on the ground that the authorisation of the compulsory purchase "is not empowered to be granted" under the relevant Act, or that the requirements of the 1946 Act have not been complied with. Paragraph 16 provides: "Subject to the provisions of the last foregoing paragraph, a compulsory purchase order . . . shall not . . . be questioned in any legal proceedings whatsoever."

[11] *Cf.* the interpretation put upon this section in *Elder* v. *Elder & Watson*, 1952 S.C. 49 and *Meyer* v. *Scottish Textile & Manufacturing Co.*, 1954 S.L.T. 273.

[12] Except that the Board of Trade might appoint an inspector to report under s. 165 (*b*) (as occurred in the *Savoy* case) and might then institute civil proceedings in the name of the company under s. 169 (4).

[13] In *Mason* v. *Harris* (1879) 11 Ch.D. 97 at 109.

Prima facie these paragraphs provide an exhaustive statement of the permissible grounds of challenge and exclude all challenges, no matter how meritorious they may be, after the six weeks' period has expired. In laying down a strict time-limit Parliament was no doubt aware that hardship would be caused to some of the individual property-owners affected. But in construing the meaning of the paragraphs, a court may also be obliged to have regard to the principle that a statute is, if possible, so to be interpreted as to avoid injustice, and to the broad proposition that fraud vitiates all transactions known to the law.[1] Where the validity of a compulsory purchase order is impugned after the six weeks' period has expired on the ground that it was made or confirmed in bad faith, conflicting views as to the jurisdiction of the courts to entertain the application may result from applying the literal rule, on the one hand, and the presumption against injustice and the proposition concerning the effect of fraud, on the other. This situation arose in *Smith* v. *East Elloe R.D.C.*[2] where the House of Lords, by a majority of three to two, held that a challenge to the validity of a compulsory purchase order after the six weeks' period had expired could not be entertained although the challenge was founded on allegations of bad faith.

The facts were as follows. In 1948 a compulsory purchase order was made under the Housing Acts in respect of Mrs. Smith's residence, which the council had requisitioned in 1940. It was not derequisitioned until 1951, when the council entered upon the land. In 1952 Mrs. Smith recovered £850 damages in an action for trespass against the council; the case is unreported.[3] In 1954, nearly six years after the compulsory purchase order had been made, she instituted proceedings against the council, the clerk to the council and the Ministries concerned, claiming damages and various declarations to the effect that the order had been procured, made and confirmed wrongfully and in bad faith. By this time council houses had been erected on the land. The defendants applied to have the writ and all subsequent proceedings set aside on the ground that the courts had no jurisdiction to grant the relief sought. Their contention was upheld by the judge in chambers, the Court of Appeal and finally by the House of Lords, except in so far as it related to the proceedings against the clerk to the council.

Viscount Simonds, Lord Morton of Henryton and Lord Radcliffe were all of the opinion that the meaning of the words used in paragraph 16 was too plain to be qualified by any of the presumptions prayed in aid by the appellant. The minority, Lord Reid

[1] See, *e.g.*, *Lazarus Estates Ltd.* v. *Beasley* [1956] 2 W.L.R. 502 at pp. 508, 516.

[2] [1956] 2 W.L.R. 888; [1956] 1 All E.R. 855.

[3] The statement of facts is taken from the report of the proceedings in the present case in the Court of Appeal ([1955] 1 W.L.R. 380; [1955] 2 All E.R. 19).

and Lord Somervell of Harrow, held that they were not plain enough to deprive a person defrauded of his remedy. However, they arrived at this conclusion by different routes. Lord Reid held that the grounds of challenge specified in paragraph 15 referred to *ultra vires* in a narrow sense and excluded bona fide as well as mala fide abuse of power; that the opening words of paragraph 16 ("Subject to the provisions of the last foregoing paragraph . . .") therefore had no relevance to a case where abuse of power was alleged; and that the general exclusionary words of paragraph 16 ought not to be construed as applying to challenges to good faith. With all respect, his Lordship's interpretation of the paragraphs is very hard to accept. It would mean that the order could not be challenged for abuse of powers in bad faith until after six weeks, and could not be challenged at all for abuse of powers in good faith. If these strange propositions are correct, they were certainly not present in the minds of their Lordships in the *Earl Fitzwilliam* case.[4] Lord Somervell, too, held that challenges to good faith fell outside both paragraphs, but, unlike Lord Reid and their Lordships who formed the majority, held that paragraph 15 was not exhaustive of the permissible grounds of challenge and did not preclude a challenge to good faith even within the six weeks' period although that ground of challenge was not included within the ambit of the paragraph. This interpretation, with all respect, seems excessively strained. The statutory procedure and grounds of challenge set out in paragraph 15 appear *ex facie* to have been intended to cover the whole field—for example, the grounds of challenge undoubtedly include breach of the rules of natural justice—and it is extremely difficult to impute an intention to Parliament that good faith should be challengeable only in a wholly separate form of proceedings.

The majority interpretation of the effect of paragraph 16 is to be preferred, not because it is logically the only possible interpretation, but because any alternative interpretation is implausible. That it may cause hardship to individuals is, however, undeniable. There is no reason why Parliament should not amend the law to give the courts a discretion to permit applications to be made out of time. Such a discretion would doubtless be exercised sparingly. If it had existed in the present case it is unlikely that it would have been exercised in the appellant's favour; she had delayed her application until nearly six years after the original order had been made, and if the order had been quashed she would have recovered her land embellished with a cluster of council houses.

Unfortunately the permissible grounds of challenge within the six weeks' period have now become a matter for speculation; for Lord Morton, like Lords Reid and Somervell, adopted a narrow

[4] [1952] A.C. 362.

interpretation of the grounds specified in paragraph 15. Thus three of their Lordships delivered themselves of considered dicta to the effect that challenges to good faith did not fall within paragraph 15 (which all of their Lordships except Lord Somervell had treated as specifying all the permissible grounds of challenge). Lord Radcliffe, on the other hand, was of the opinion that paragraph 15 covered all the recognised grounds of invalidity (including bad faith), and Viscount Simonds inclined towards the same view, though without making any finding on the point. It would be deplorable if Lord Radcliffe's interpretation, which is eminently reasonable and is supported by precedent, were not to prevail. The alternative interpretation of paragraph 15 would leave a person whose property had been taken away by a public authority without any statutory remedy whatsoever against the authority if the authority had used its powers ostensibly for a permitted purpose but in fact dishonestly. The dicta supporting that interpretation may well have considerable persuasive authority; but their weight is necessarily diminished by the diversity of approaches to the main issue followed in the speeches in which they appear. It is to be hoped that the uneasiness that they have aroused will be ended when the questions they pose next come before the courts.

S. A. de Smith.

Implied Warranty of Fitness for Habitation

The contrasting attitude of the courts towards rules of real and personal property is one of the most conspicuous features of our jurisprudence. This contrast is particularly striking in the rules relating to implied conditions for fitness. In the law of sale of goods implied conditions, now codified in the Sale of Goods Act, 1893, ss. 12–15, and the liberal construction placed upon them, have virtually destroyed the force of the injunction *caveat emptor*. On the sale or demise of land it still retains its full power, except in the case of furnished lettings and sales of houses in the course of erection. In the latter two cases there is an implied warranty that the house is, or will be when completed, fit for habitation. Unhappily, in the recent case of *Lynch* v. *Thorne*,[1] the Court of Appeal have further restricted the ambit of these salutary exceptions.

The plaintiff contracted to buy from the defendant builder a house in course of erection. The defendant was to complete the house in accordance with specifications which provided for outer walls of nine-inch solid brick. The house was completed in strict

[1] [1956] 1 W.L.R. 303; [1956] 1 All E.R. 744.

accordance with the specification and with sound materials and good workmanship. But the nine-inch wall did not, and could not, keep out driving rain and one of the bedrooms was consequently unusable. The county court judge found that the plaintiff had relied on the defendant's skill and judgment, that there was an implied warranty that the house would be habitable, and that this warranty had been broken. He accordingly awarded the plaintiffs damages. His decision was reversed by the Court of Appeal.

The argument of the Lords Justices proceeded thus: In an agreement for the sale of a house in course of erection there is, prima facie, an implied term that the house will be habitable. But such a term can only be implied if it is consistent with the express terms. Here it would be wholly inconsistent since, in the case of this house, nine-inch solid walls could never produce a habitable house and the express obligation of the seller was to erect nine-inch solid walls.

This sounds plausible but is, with respect, a complete *non sequitur*, as would have been revealed by a reference to the cases on the equivalent implied condition of fitness under the Sale of Goods Act. Take, for example, the well-known case of *Baldry* v. *Marshall*.[2] There the buyer wanted a comfortable car for touring. Relying on the seller's judgment he was persuaded to buy an 8-cylinder Bugatti. It was held that there was a breach of the implied condition of fitness for his purpose. Yet the express obligation was to sell an 8-cylinder Bugatti and no 8-cylinder Bugatti (1925 vintage) could have been made "comfortable for touring." The facts in *Lynch* v. *Thorne* are, it is submitted, exactly comparable; the buyer had relied on the seller's skill and judgment that a house with nine-inch bricks would be habitable and there was no inconsistency in implying a term to that effect. But the Master of the Rolls said that this would involve "an extension of the principle of implied terms for which I can find no authority." Authority could have been found in any treatise on Sale of Goods. Unhappily, decisions on Sale of Goods were not cited—an unfortunate illustration of the tendency to keep the two branches of the law in water-tight compartments. As a result the onus is cast onto the unskilled buyer of ensuring that the specification tendered by the builder will produce a habitable house. One of the two exceptions to the *caveat emptor* rule has been virtually destroyed.

L. C. B. G.

[2] [1925] 1 K.B. 260.

The Broken Marriage in Divorce Proceedings

The dichotomy of the basis of the grounds upon which a decree of divorce should be granted formed the background to the rift in the views of the members of the Royal Commission on Marriage and Divorce. The proponents of this dichotomy based their approach to the subject according to the diametrically opposed —although not mutually exclusive—concepts of, on the one hand, the "matrimonial offence" and, on the other hand, the "broken marriage." It is not intended here to argue the cause of either notion but by way of illustration of a recent case, *Ingram* v. *Ingram*,[1] to point the extent to which the realities of the day-to-day manifestations of the matrimonial union are present in the existing judicial machinery for the obtaining of the dissolution of marriage. Put in another way, what part does the *de facto* dissolution of the marriage play in the process towards conferment of the *de jure* recognition?

The notable judgment of Sachs J. in *Ingram* skirmished with many, and decided some, of the difficult legal problems attendant upon proving a matrimonial offence. Apart from an interesting application by way of distinguishing the rule of evidence in *Hollington* v. *F. Hewthorn & Co.*[2] as to the admissibility and relevance of a criminal conviction for the purposes of establishing a matrimonial offence, the court ran the gamut of legal technicalities in canvassing the allegations of cruelty, constructive desertion, ordinary desertion, and the rights to maintenance on an unsuccessful petition as effected by the spouse's conduct elicited in the course of the proceedings.

Shortly, the facts of that case were as follows: the parties were married in 1922 in Cologne where the husband was then serving in the forces, the wife being a German subject; one son of the marriage was born in 1923. The matrimonial home until 1939 was Portsmouth, the husband for the most part serving in England but inevitably limiting his time in the home to week-ends and leave. It appears to have been a happy marriage in the early years taken as a whole although there did exist certain pin-pricks which the sporadic periods of cohabitation due to the exigencies of service tended only to mollify. Furthermore, as Sachs J. found, the wife was quite the dominant partner although at this time it did not manifest itself adversely. It was given expression to in the later years by the wife's ever-increasing espousement of the cause of Nazi Germany and was undoubtedly the one factor which proved fatal to the continuance of a tolerable marriage. The history of the marriage subsequent to 1939 only underlined the effect of the wife's behaviour towards her husband

[1] [1956] 3 W.L.R. 782.
[2] [1943] K.B. 857.

and confirmed, if confirmation were needed, the fact that the marriage was one in name only. The wife in July 1940 was convicted at the Old Bailey of charges under the Defence Regulations, 1939, and the Official Secrets Act, 1911, for conspiring to aid and assist the enemy in diverse ways. From a sociological viewpoint the marriage in fact ceased then if indeed it had not broken up a year earlier. The parties never again cohabited—the home in Portsmouth was given up, the husband going to live with a sister —and the succeeding years were swallowed up in prolonged silences and from 1945 onwards revived only to the extent that the wife began jockeying for position to sustain a claim for maintenance.

The husband was not unnaturally shocked by the revelation of the wife's treasonable conduct which he at first refused to believe and only accepted on her conviction. His service life was adversely affected amongst those with whom he served and he was soon sent abroad to India until 1945. On these findings Sachs J. held that cruelty had been established, for this purpose admitting the evidence of the conviction to indicate the acts constituting the wife's treasonable conduct and the effect these acts, as well as the bald fact of conviction, had upon the husband. The husband's return in 1945 was soon followed by three visits to the wife in prison during which numerous statements were alleged to have been made tending to show desertion by one or other of the spouses; there was also some correspondence of an equivocal nature. On this detailed and lengthy evidence Sachs J. held that were he wrong on the question of cruelty, constructive desertion had been proved, employing the wider test laid down in *Lang* v. *Lang* [3]; failing these findings ordinary desertion was held to have been proved.

The present proceedings were not, however, commenced until 1954 at which time the only allegation pleaded was that of ordinary desertion, the acts of cruelty being allowed as amendments to the pleading at the hearing. The delay in presenting the petition is not wholly explicable from a reading of the report but appears to have come about through a cumulation of factors; the husband's faint attempts at reconciliation from 1945–1947, his propensity to allow matters to drift, a delay in 1954–1955 due to the difficulty of tracing the whereabouts of the wife for service, and more specifically the obstacles that appeared to present themselves in successfully prosecuting a petition for divorce. The existence of a ground for divorce based on a number of years' *de facto* separation would have set at rest these latter fears.

It is perhaps a truism to state the ultimate aim of the parties to a divorce suit. In this case there existed the added factor that the wife in cross-petitioning for divorce sought to secure for herself financial benefit, an objective which on Sachs J.'s finding

[3] [1955] A.C. 402.

would have eluded her since her conduct was such as to "operate in diminution—even to the point of extinction—of any sum which might otherwise be due to her." In striving to achieve their respective aims the parties were obliged to adduce evidence ranging over a number of years in order to meet the requirements of proving a matrimonial offence. The subject-matter of a three-day trial concluded by a lengthy judgment may fairly be said to have obfuscated the ultimate goal almost to the point of extinction were it not for the conclusion of the suit.

The social necessity, and indeed desirability, of civil litigation whereby one party comes to the court to seek enforcement of his rights by way of relief in the form of damages, specific performance, injunction or declaration is in divorce proceedings considerably altered by the ambivalence of the right of the "innocent" spouse to relief and society's interest in the removal of the status of husband and wife; this is accepting of course the view that divorce proceedings are in the nature of civil proceedings and not quasi-criminal. *Ingram* v. *Ingram* is an example, perhaps in itself not altogether typical but common enough, of the unreality in divorce proceedings of the seeking of a remedy by one spouse for an infraction of that spouse's right to the incidences of matrimony. Where the offence in fact represents a breach of the matrimonial duty and in itself causes the non-offending spouse to regard the dissolution of the marriage as a necessary outcome a petition based on that offence is *per se* unobjectionable. The matrimonial offence, however, proved to a divorce court is so often an artifice, necessary to achieve the desired end, that the proceedings swallow up the circumstances leading to the true cause for the break-down in the marriage. That the courts are not wholly unaware of this fact is demonstrated by Sachs J. in *Ingram* when he states: "The true cause of the marriage breaking up was the wife's continuing preference for the Fuehrer over her husband." As penetrating as this observation is as to the root cause of the marriage becoming one in name only, the adherence of a spouse to the sway of a despotic dictator is by itself far removed from the commission of a matrimonial offence as indeed the judgment indicates. It is only the developments from this root cause that may or may not give rise to sufficient grounds to found a petition for divorce.

L. J. Blom-Cooper.

International Air Carriage—Limitation of Liability

Preston v. *Hunting Air Transport* [1] was an important addition to the small group of English cases where the Warsaw Convention,

[1] [1956] 1 Q.B. 454.

1929, as enacted in the Carriage by Air Act, 1932, has had to be interpreted. Ormerod J. decided, first, that a passenger ticket which omitted to state one of the prescribed particulars, namely, the agreed stopping places, was nevertheless a passenger ticket within the meaning of the Convention, with the result that the carrier was not caught by Article 3 (2) of the Convention which provides that "if the carrier accepts the passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this Convention which exclude or limit his liability." He held secondly that the words in Article 17, "The carrier is liable for damage sustained . . ." entitled the infant plaintiffs, whose mother had been among the passengers killed in an aircraft accident, to recover something over and above their actual financial loss.

It will be recalled that the scheme of the Convention is to impose an almost automatic liability on the carrier in the event of death or injury to the passenger, while giving the carrier the protection of a limitation provision which effectively limits his liability to a sum of about £3,000 per passenger (on current figures). There are some exceptional circumstances when the carrier cannot rely on the limitation provision. One example is where he has been guilty of wilful misconduct. Another example is Article 3 (2), quoted above, *viz.*, where no passenger ticket has been delivered. One of the features of the Convention is that it contains strict formal requirements for documentation and prescribes in some detail and in mandatory language the particulars which must be stated on a passenger ticket, on a luggage ticket and on an air consignment note respectively. (Incidentally these provisions are not to be found in the modified version of the Convention as applied to domestic carriage by air in this country by the Carriage by Air (Non-International Carriage) (United Kingdom) Order, 1952,[2] and will be greatly simplified in the Convention itself if and when the Hague Protocol, 1955, receives a sufficient number of ratifications.) For the passenger ticket, five particulars are prescribed by Article 3 (1). The third particular is "the agreed stopping places." In the case under review, it was conceded that this particular was omitted. Article 3 (2) then goes on to provide: "The absence, irregularity or loss of the passenger ticket does not affect the existence or the validity of the contract of carriage, which shall nonetheless be subject to the rules of the Convention . . ." Pausing there, one would have said that this was obviously a case of irregularity and not of absence or loss. Article 3 (2) then concludes with the words already cited: ". . . Nevertheless if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this Convention which exclude

[2] S.I. 1952, No. 158.

or limit his liability." It was argued from this that no passenger ticket had been delivered because nothing could be a passenger ticket within the meaning of the second limb of Article 3 (2) unless it contained all the particulars prescribed by Article 3 (1). The learned judge had no difficulty in rejecting this argument. It can be shown to be wrong by the internal evidence of Article 3 and if any doubt remains it is set at rest by a comparison with the corresponding provisions of Article 4 (4) and Article 9 on luggage tickets and air consignment notes. For there it is expressly provided that certain specified omissions or irregularities in these documents shall deprive the carrier of his right to rely on the limitation provisions. The absence of any similar provision in the case of the passenger ticket is conclusive evidence that the omission of a prescribed particular is merely an irregularity and the provisions of the Convention, including the limitation provisions, still apply to the contract of carriage. It is comforting to reflect that the same decision has been reached in an American case [3] and in a Belgian case [4] and that all three decisions are manifestly in accord with the intentions of the framers of the Convention.[5]

As regards the second main point in the case the learned judge in construing the words " damage sustained " in Article 17 (" The carrier is liable for damage sustained in the event of the death of a passenger . . ."), awarded £400 to the two infant plaintiffs over and above purely financial loss to compensate them for the loss which they had sustained by reason of the fact that they had lost the care of their mother at an age when probably they needed it most. It is respectfully submitted that the decision on this point is open to doubt in view of the line of cases on the Fatal Accidents Acts in which it has been consistently held that no sum over and above purely financial loss can be awarded. A comparison between the language of section 2 of the Fatal Accidents Act, 1846, and of Article 17 (*supra*) does not reveal any obvious reason why the two provisions should be differently construed and by section 1 (4) of the Carriage by Air Act, 1932, and the Second Schedule thereto (entitled " Provisions as to the liability of the carrier in the event of the death of a passenger ") an attempt has been made to assimilate the position under the two Acts.

F. P. Neill.

[3] *Grey* v. *American Airlines* (1950) 95 F.Sup. 756 which was cited to the learned judge.

[4] *Pauwels* v. *Sabena*, 4 Revue Française de Droit Aérien (1950) 411, 418–419; [1950] V.S.Av.R. 367, 374–375.

[5] D. Goedhuis, *La Convention de Varsovie* (1933) pp. 108–110.

REVIEWS

Obscenity and the Law. By Norman St. John-Stevas. With an Introduction by Sir Alan Herbert. [London: Secker & Warburg. 1956. xxii and 289 pp. 25s.]

"There is no such thing as a moral or an immoral book. Books are well written or badly written. That is all." Mr. St. John-Stevas quotes this epigram of Oscar Wilde's in his admirable work on *Obscenity and the Law* to illustrate the revolt of the "aesthetes" of the late nineteenth century against what they felt to be the restrictive prejudices and conventions of Victorian family morality. The epigram, which sounded so paradoxical and risqué in the "naughty nineties," will strike many readers today as merely sententious. Yet the law, when it tries to preserve us from literary works "of a nature calculated to shock the common feelings of decency in any well regulated mind"—instead of leaving us to do the job for ourselves—has not moved one inch from a position taken up almost 100 years ago. Indeed, to judge from recent criminal statistics and the spate of recent prosecutions against reputable publishers for alleged obscenity of works of acknowledged literary merit, the police seem to be determined to out-do, if possible, the Victorians.

In the circumstances this full-scale inquiry into the history and present working of the law of obscenity—the first, so it would seem, in a strangely neglected field—is greatly to be welcomed. On a subject fraught with controversy Mr. St. John-Stevas writes with moderation. He is far from suggesting that the whole question of obscenity has been created by a group of "unenlightened Grundys and Comstocks." "Those authors who pretend that there is no problem," he writes, "only bring discredit on their own cause . . .; on the other hand those who pose the question as a clash between a group of irresponsible intellectuals, leaders of a minority literary coterie, striving to impose their extravagances on the virtuous and sober-living majority are equally wide of the mark. . . ." The obscenity problem does in the last resort involve a conflict between the right of the creative artist to freedom of expression, and public morality; it is a field in which the law ought to move, if at all, with extreme care.

In fact, the historical survey which fills more than half of this book makes it plain that serious literature did not begin to suffer from the intervention of the law courts until towards the end of the Victorian era. By then the law, in its anxiety to keep in check a veritable flood of cheap pornographic trash, had already hardened into the rigid grooves of Lord Campbell's Act, 1857, and Sir Alexander Cockburn's judgment in the *Hicklin* case (1868). If we have fortunately escaped direct censorship in literature, the author makes it abundantly clear that the present situation is wholly unsatisfactory. The law is so wide and so ill-defined that it could be considered tolerable only if it were administered by all concerned with invariable moderation and restraint. As it is the vast discretion, and responsibility, left to the Director of Public Prosecutions, to the judges and juries are by no means consistently, or even predictably, exercised. Writers, publishers and printers of serious purpose and high reputation are wide open to the hazard of finding themselves in the dock as criminals and open to punishment which is practically at large. Their defence is seriously embarrassed by the fact that neither artistic and literary merit, nor the

intention or purpose of the author, artist and publisher are taken into account.

Mr. St. John-Stevas makes a sharp distinction between pornography on the one hand and real literature on the other. He believes that a formula could be devised which would enable juries and magistrates to distinguish between the two. There are indeed many today who feel that the law can be justifiably invoked only to suppress straight pornography designed to exploit financially misguided or frustrated sexual instincts, while literary expression of serious purpose should be left to be determined by prevailing standards of public taste. The pressure of public opinion towards conformity in methods of sexual decency, exercised through literary criticism, through the lending libraries, through monopoly institutions like the B.B.C. and in a variety of more subtle forms is almost always severe, as those will realise who recall Charlotte Brontë's agonised outcry when she found this passage in one of her reviews: "If *Jane Eyre* be the production of a woman, she must be a woman unsexed."

Clearly the law only makes itself ridiculous if it attempts to endorse with legal sanctions ephemeral and passing opinions on matters of morality and decency. Yet the huge demand for horror comics and for evidently pornographic publications would seem to indicate that it is not possible at this stage for the police to leave the question of obscenity studiously alone. I am inclined to agree with the author that the courts, rather than an independent board of review, are still the best place to deal with them. Mr. St. John-Stevas sets out, and discusses, no fewer than twelve "anomalies" in English law as it stands at present, the most serious of them perhaps the fact that evidence concerning the literary and artistic merit of a book is not admissible in proceedings of this kind. In the circumstances the Bill on Obscene Publications, drafted by the (private) Herbert Committee last year to amend, clarify and consolidate the law (its text is here reprinted in full), deserves most serious consideration.

In addition to his exhaustive discussion of English law, Mr. St. John-Stevas has assembled a great deal of material on foreign law, which will be most useful if and when this new Bill comes before Parliament (though unfortunately there is little indication of how far, in any given country, the existing provisions of the law are in fact enforced). A whole chapter is given to the law and practice of the United States, where they order this matter rather better than over here; readers will be grateful for the lengthy quotation from Judge Learned Hand's enlightened judgment in the *Ulysses* case. Another chapter offers by contrast a full picture of the working of censorship in Ireland and the author arrives at the conclusion that: "undoubtedly the (Censorship) Board has succeeded in keeping out of Ireland a great mass of pornography of a filthy and corrupting kind, but this has only been achieved at the price of depriving Irish readers of many of the best works of contemporary literature." Good literature can flourish only in an atmosphere of freedom. It was Henry James who wrote: "It may be said that our English system is a good thing for virgins and boys and a bad thing for the novel itself, when the novel is regarded as . . . a composition which treats of life and helps us to know." Mr. St. John-Stevas has written his survey as a lawyer and a lover of literature; what he has to say is addressed to the public at large and not only to the members of his own profession. It may be too late for the courts today to free themselves of their own volition of tests and criteria of obscenity so long and so firmly established. But the English bench and bar can claim with pride that its relations, and its links, with literature have ever been close, and this powerful plea for a new approach will certainly not go unheeded.

H. A. Hammelmann.

The Law of Damages in Scotland. By David M. Walker, M.A., LL.B., PH.D., Advocate, Professor of Jurisprudence in the University of Glasgow. [Edinburgh: W. Green & Son, Ltd. 1955. lxxii and 818 and (index) 24 pp. £6 6s. net.]

It is a great pleasure to welcome Professor Walker's treatise on damages. In a sense it is a pioneering venture as there is no other work in Scotland covering the same field. Indeed, English lawyers must view its learning and scope with envy. The book has already received detailed criticism in the pages of Scottish legal journals and the present reviewer can only aim at noting its contents and commenting on some of the more general problems discussed in it.

The word "damages" in Scotland is now given a very wide meaning, as witnessed by the variety of subjects dealt with in the book. The author emphasises that "damages" is not synonymous with "reparation," the specific subject of Guthrie Smith's work of which the last edition appeared in 1889. But, however wide the meaning attributed to that term, it is imperative for any writer on this topic not to allow himself to stray into protracted discussions on the question of the liability to pay damages as opposed to the measure of damages itself. Here Professor Walker shows a fine sense of proportion and sure judgment. On the other hand, it is impossible to avoid discussing liability altogether and the reader will be grateful for many illuminating remarks on this subject. The author covers an immense field: Damages in Contract, Sale of Moveables, Contracts of Lease, Companies, Bills of Exchange, Breach of Trusts, Delict, Damage to Property, Breach of Statutory Obligation, Damages in Conflict of Laws—to name only some of the chapters. A wealth of Scottish authorities is cited together with all the relevant English cases. (These are unfortunately sometimes so intermingled that it is difficult to separate the English from the Scots rules.) The author has wisely refrained from encumbering the book with references to Commonwealth and American cases.

In the course of an interesting discussion on *Re Polemis* Professor Walker dispels the present writer's belief that the authority of that case is confined to England. His view is that although its *ratio decidendi* has never been expressly adopted by Scots courts, it has been partially relied upon in some cases and must therefore be regarded as having a niche in the law of Scotland. All the recent cases are well discussed but one would have welcomed a fuller examination of the *rapprochement* between the tort and contract tests supposedly deducible from some of them. It is particularly difficult to agree with the statement (p. 32) that it conduces "to clarity of thought" to consider breach of contract and delict separately and to treat the test of reasonable foreseeability as confined to contract. On the contrary, differentiation between the two would only seem to add to the confusion. Any attempt at dogmatism in this field is a bold venture in view of ambiguity of judicial pronouncements rarely equalled in other parts of the law. For Scotland the author enumerates (p. 537) sixteen "determining phrases" used by judges in cases of remoteness of damage in delict alone. The endeavour to give technical meaning to common expressions may be heroic but is rarely illuminating. Whether breach of contract or a tort is in question, in the last analysis damages must surely be awarded on a common sense basis in the light of all the relevant circumstances, whatever test or tests the court professes to apply.

The book also shakes another of the reviewer's beliefs, that proof of *damnum* is in Scotland an essential condition in any claim for damages. Professor Walker thinks this is so only in the case of delicts (p. 511): "Scots law does not subscribe to this doctrine that any invasion of a legal right, however trifling or innocent, amounts to a legal wrong sounding in at least nominal damages." But in contract he is of the opinion that actions for

nominal damages will now be admitted as they are in England. Yet, on reading the cases he cites in support of this proposition, the damages awarded all appear to have been more than merely nominal and to have included some element of compensation.

Special mention must be made of five valuable appendices devoted to that pre-eminently practical subject, the quantum of damages. Awards must always depend on the special circumstances of the case and the author disclaims any intention of producing a "tariff." As, however, decisions on quantum are not often reported the examples he gives of various kinds of current awards will supply the practitioner with badly needed guidance. In Scotland this problem is even more elusive than in England as most awards are made by juries and are in consequence not easily predictable. Juries usually err on the side of generosity but that this is not always so is shown by the recent case of *Gill* v. *National Coal Board*, 1954 S.L.T. (Notes) 41, where incredibly low damages were awarded to the family of a miner killed in an accident.

The publishers are to be congratulated on the quality of printing and the lay-out, although the price seems rather high. Whilst the book is mainly intended for practitioners its breadth of approach and mature scholarship should appeal to all students of the law. At the same time, the very full and up-to-date discussion of English decisions and the striking similarity of the two legal systems in many spheres make Professor Walker's work of great interest to English lawyers.

J. K. Grodecki.

The Law of Reparation in Scotland. By the late A. T. Glegg, Fourth Edition by the late J. Lindsay Duncan. [Edinburgh: W. Green & Son, Ltd. 1955. xl + 479 + index 38 pp. 90s. net.]

The previous edition of this leading work on the law of torts in Scotland was published in 1939. Fortunately the late Sheriff Lindsay Duncan was able to undertake its revision and before his untimely death in 1954 the present edition was in proof; it was seen through the press by Professor D. M. Walker, but Professor Walker's own views, as evidenced by his recent work on *Damages*, differ in some respects, *e.g.*, on the question of whether damages in reparation are restricted to the natural and probable consequences of a civil delict.

It is a pleasure to congratulate the publishers on the attractiveness of the type, the absence of misprints and the spacing of the subheadings which, according to my estimate, are on an average about two-thirds of a page apart, somewhere near the ideal for a practitioner's work.

Duncan (or Glegg) does not contain a great deal of theory, classification or analysis. So far as it enunciates a general theme, this is that reparation in Scots law is founded on malice (*i.e.*, intention) or negligence and does not, apart from the case of the master's vicarious liability for his servant, admit strict or absolute responsibility. Scots decisions analogous to *Rylands* v. *Fletcher* are explained as turning on the requirement, in special circumstances, of a high standard of care together with a shift of the burden of proof to the defender. From a strictly analytical point of view one would be bound to criticise the fact that causal problems are treated partly under the maxim *culpa tenet suos auctores* and partly under *causa proxima non remota spectatur* while vicarious responsibility appears partly under *culpa tenet suos auctores* and partly as a chapter in the section on negligence, though it is clear that in Scotland as in England the master and servant principle applies to certain intentional delicts of a servant and not merely to negligent

delicts (see pp. 426 *et seq.*). However, it is perhaps churlish to expect a systematic or scientific presentation in a practitioner's work and the reviewer draws attention to its absence merely to make the point that the outlook which has inspired this and previous editions is much closer to the English than to the Continental point of view.

There are certainly differences of detail between the Scots law of reparation and the English law of torts, for instance in regard to slander and the abuse of civil process. The Scots law in relation to the latter appears complex and has no real parallel in England. Are the differences, however, such that the two systems may be regarded as variants of a single stock or do they represent two different stocks? Duncan's scholarly and accurate revision of Glegg leans slightly in favour of the independence of Scots law but the English reader may be inclined to suspect that, despite the currency in Scotland of strange and captivating terms of art, the law of reparation has by now been so corrupted or fortified by English precedents and the ambiguous decrees of the House of Lords that much of its original character has vanished.

A. M. Honoré.

Recht und Zeit. (Fünf rechtsphilosophische Essays.) By Gerhart Husserl. [Frankfurt am Main: Vittorio Klostermann. 1955. 225 pp. DM. 17.50 (cloth); DM. 14.50 (paper).]

The author, who is a Professor of Law in the University of Freiburg, is the son of the distinguished exponent of that philosophical genre styled phenomenology or, more specifically, phenomenological idealism; and the essays in the book under review represent essentially a phenomenological treatment of various legal topics. It is only right to say at the outset that, as the inside cover tells us, the essays do not purport to constitute an integrated systematic unity; but at the same time, they are not unconnected internally.

The essence of this phenomenology—if one may attempt to compress into a small space so highly complex and abstruse a form of logical doctrine—is a theory of ideas reminiscent of Plato. The things which we meet in the world, the intentional objects of our consciousness, are not the things themselves as such: they are what they are because and in so far as they are a materialisation—a realisation—of the idea which they signify, their essence, which is *the thing itself*. "The thing itself" is experienced, whether directly (intuitively) or mediately by the direct experience of others, in and through the material manifestations (*i.e.*, the phenomena about us, from which the method derives its name). For instance, a trireme, a galleon, a cruiser, an atomic submarine would be recognised as a *ship* because and in so far as one perceives in it a materialisation of—and thus experiences through it—the *idea* of ship. (The idea is not necessarily simple—*e.g.*, the idea of "ship" inevitably connotes buoyancy, concavity, a mode of propulsion through water, etc.) True knowledge is concerned with "the thing itself." Now the visible manifestation may be experienced by different actual individuals in different aspects—the pharmacist, *e.g.*, and the person with a cold will see *the same* material cough-mixture from different points of view. But an aspect is not the thing itself. For a true experience of the thing, therefore, the experience, too, must be objective—the only experience valid for this purpose is that which is valid for "any man" (*jedermann*). "Any man," again, depends upon the thing in question: if it be "shoe," for example, any man is any shoe-wearing being; in the case of, say, the thing "larceny," the members of the State whose legal order makes provision for "larceny," etc. But again, for the pure objectivity which alone gives a true experience

of "the thing itself," any man is abstracted. The reference is not, as it were, to an average actual individual as he lives, moves and has his being, but to the depersonalised *ego*, the *ego* dissociated from the actual individual —"any man" as what he is in common with all others of the group in question; that part of him which is the ultimate residuum of community with all individuals. Men are not *merely* shoe-wearers or subjects of a legal system; they are *also* shoe-wearers or legal subjects—just as they may also be fathers or tin-plate workers: but it is the shoe-wearer or legal subject in them which is the whole of one's concern in evaluating experiences of the things, shoe or larceny.

Phenomenological development to this position was, of course, gradual. The problem of "the thing as it is for me" and "the thing as it (objectively) is," "the thing itself," was a Kantian legacy, Kant having denied the possibility of knowledge of "the thing itself." The elder Husserl in effect answered the challenge. Rejecting Hegelian idealism, he set out in the footsteps of such realists as Bolzano and Brentano, stressing the need to start from the actual about us, and, through the evaluation of valid experiences thereof which would give sureness of "the thing itself," eventually came to this theory of ideas, of essences, as the things themselves, the ultimate realities. The phenomena exist in and are conditioned by their historical circumstances: the idea materialised has an existence independent of time (*Entzeitung*). There is, however, no Platonic ἀνάμνησις about this ideal theory; Husserl would not exclude the discovery in time of a new idea with a new material invention, but posited that form and by the invention the idea materialised therein achieved the *Entzeitung* referred to. It would also appear that, though Husserl would have regarded himself as anti-Hegelian, his ultimate position was in fact close to that of Hegel —true, Husserl's *jedermann* remained the individual; but there would seem little more than a formal difference between "the individual reduced to that which he is in common with all other individuals" and the Hegelian "universal" concept.

This outline is extremely sketchy; sufficient, however, it is hoped, has been said to indicate the abstraction of the process of, and the abstraction of "things" in, phenomenology. Now what of phenomenology in the realm of law?

The prime question would seem to be, What is the *idea* of law, that essence which is manifested in actual legal systems in all ages and circumstances? The question is raised in the first essay, *Recht und Zeit*, but unfortunately Professor Husserl does not directly answer it, though his subsequent discussion of the development of legal rules in a community suggests that, for him, it is to be found in the (objectivised) ideas of justice (*Gerechtigkeit*) and Will of the Legislator. Surely, an uninformative essence without more. But we learn further in the second essay, *Erfahrung des Rechts*, that, law being not merely a conceptual subject of specialist experience by the jurist but also a living factor in social reality—"there" for every *Rechtsgenosse*, the experience of law which is valid for *jedermann* involves the "basic propositions of right and wrong living in the consciousness of the nation" (*die im Bewusstsein des Volkes . . . lebenden Grundvorstellungen von Recht und Unrecht*). "Basic propositions of right and wrong . . . consciousness of the nation," association (and surely virtual equiparation) of Justice and the Will of the Legislator; surely, one thinks, I recognise something here. Growing unease is, in the reviewer's opinion, confirmed in the last essay, *Opfer, Unrecht und Strafe*, where the author argues that the *Rechtsgemeinschaft* does not represent "another" or "other persons," *vis-à-vis* a member thereof (*sc.* as *jedermann*); that the legal order is the "right road of his life"—the road of Freedom as against wilfulness (arbitrariness) in the conflict between *Freiheit* and *Willkür* which is a basic feature of human existence; and thus that the individual punished for a

crime is not subjected to the exercise of power, as it were *ab extra*, but is rather returning to the right road and is essentially in the same position as a person making voluntary atonement for a misdeed. (*Insoweit besteht kein grundsätzlicher Unterschied zwischen der Situation des Menschen, der für ein begangenes Unrecht freiwillig Sühne leistet, und des Menschen, der das Leid einer Strafe erfährt*: p. 196). Is this not something very like what one associates with Hegelianism? The accidents are altered; the substance is the same—and the countervailing views remain.

The ultimate picture, then, it is submitted, is not new. Not that there is any reason why it should be: a wholly new vision of law is a somewhat utopian prospect—an abstraction of *the* essence of that many-essenced "thing" is a task that one might well respectfully consider to be beyond the powers of *jedermann*, in any sense. More important, it is suggested, is the question whether this picture is one to be greeted with enthusiasm in the modern world; the reviewer's answer is in the negative.

If, however, we stop short of the metaphysical and concentrate upon the discussions of experiences of various phenomena, the unaccustomed approach is full of interest. In *Recht und Zeit*, for instance, apart from the fundamental issue, Professor Husserl discusses the legal norm as a present fact, inevitably postulating its own pre-history (the circumstances giving rise to its appearance) and the contemplation of the realisation of its content in the future; and analyses the "inner time-structure" of legal relations and the "time-perspective" of those concerned with the making and administration of the law from the standpoint of their experiences of the law. *Erfahrung des Rechts* and *Objectivität im Recht* essentially present a novel vindication of the judicial decision, while *Recht und Prozess* considers the unfolding of a case and the operation of law through the course of proceedings.

From the present more limited point of view, *Objectivität im Recht* is an ideal illustration. Suppose that the criminal code provides that a person who behaves in a specified manner is guilty of theft: X has taken Y's purse and is now on trial for theft before the court, whose task is the realisation of the wrongful situation specified in the code (*der Verwirklichung des gesetzlichen Unrechtstatbestandes*) as what it in fact was and is *de jure*. How can this be?—if X did do the act which is of the kind that the law says is theft, then surely the *Unrechtstatbestand* is already there: what can the judge determine? The code is concerned with theft as such; the present concern, though, is *this* alleged theft of X. What *happened*—for, of course, the trial comes when X's conduct is in the past—was conduct by X, which might have appeared then to different people differently, and still more so, now, when they experience it again as a past thing: that the conduct *is* a theft, objectively "there," is inseparably linked with a true decision that it is; and such decision postulates a valid experience of the thing "theft" in this case: *Es ist, was es ist, als Gegenstand einer gültigen Erfahrung, deren logische Form ist das wahre Urteil.* Such experience must be valid for, and thus made in the capacity of and from the standpoint of, *jedermann*. The parties each have only their own version of the conduct in the centre of their field of vision during the trial: only the court, which represents *jedermann* (for the thing is a legal one), experiences the thing during the trial as what it then is—an "either/or" situation (*i.e.*, X did/did not commit theft), and thus only the decision of the court that X did commit theft, coming at the conclusion of the trial, is a valid, a true, decision.

One's interest in these essays, then, is taken rather by the approach than by the conclusions, which—leaving aside the fundamental issue—are surely data which may be rested on more tangible foundations. This, it is thought, is not insignificant. Plato himself, it may be fairly said, devoted a considerable amount of dialectic to the endeavour to avoid the difficulties he perceived in the theory of ideas associated with his name; and when he did, in the *Republic*, venture to describe the world of ideas, avoided reality

and dealt in myth. Surely a recognition that, even though one may come to acknowledge the "representational" nature of the world of actuality, one cannot—as a natural man of that world—truly get to grips with the world of essences. Of phenomenological incursions into the field of the natural sciences, a generally sympathetic observer has said, "The concepts that we form immediately with a single universalising abstraction, or eidetic intuition, are extremely vague and indeterminate; to arrive at scientific concepts, lengthy elaborations are necessary and when we are treating of entities of physical nature, the one way to obtain less imprecise concepts is scientific induction . . ." (S. M. Rovighi, *La Filosofia di E. Husserl*, Milan 1939, pp. 165–166). And the law is so much more than a conceptual exercise. . . .

J. A. C. Thomas.

Political Thought of the German Romantics. Translated and Selected by H. S. Reiss. [Oxford: Blackwell. 1955. 211 pp. 15s. net.]

This is a selection from the writings of Fichte, Novalis, Müller, Schleiermacher and Savigny. The approach of the Romantics to political philosophy is so much a reaction against the methods of analysis and logical reasoning adopted by the Positivists that it jars the very foundations upon which English jurisprudence is built. The notions of jurisprudence which are incidental to this political theory (save for Savigny with whom political theory is incidental to jurisprudence) are provoking by reason of their incompatibility with our own accepted premises. This revolt against reason, with its reliance on intuitive insight and the power of the imagination, is phrased in the language of poetry rather than analytical logic. Universal principles of law, even of natural law, are rejected in favour of a relativistic and extremely conservative approach to law, based upon a somewhat imaginative insight into history.

The works of Fichte take up one-third of the book, and, though one can see in his "Addresses to the German Nation" the force of his appeal to an ambitious national state, his legal analysis of the basis of the social contract, of municipal and international law, is unimpressive. He writes as a political theorist, not as a lawyer; perhaps one can quote his statement of the most fundamental right of man ". . . the right to the presupposition that all men are able to enter into a legal relationship with him by a contract." Müller and Novalis, united in their glorification of medieval society, and Schleiermacher, lamenting the passing of the unity which the Church gave to Christendom, shirk the problem of the future in an irritating way.

In these writings, however, one can see the trend of thought which conditioned Savigny's approach to jurisprudence. Unhappily Savigny gets scant treatment here, but the philosophical background to his own approach is clearly seen from the selections from other writers, and in that context one realises the reason for his demand that legal institutions be allowed free development according to the trend of history and the common consciousness of the people. This demand, involving as it did a curb on rational law reform, strikes one as curious, for Savigny was Prussian Minister for the Revision of Legislation from 1842–1848.

D. W. Bowett.

The Law of Bankers' Commercial Credits. By H. C. Gutteridge, q.c., ll.d. Second Edition. By Maurice Megrah, m.com. [London: Europa Publications Ltd. 1955. xxiii and 227 (with index) pp. 25s. net.]

The banker's documentary credit system is the method by which the great bulk of modern international commerce is financed, and is therefore an institution second to none in importance in the world of trade. Its legal aspects are not only exceptionally complex, but are very imperfectly understood, since some of them have never been elucidated by courts of law and others only in a somewhat general way.

Banker's credits have been used in foreign trade since the eighteenth century, and the documents-against-acceptance method of making use of them came before the courts in a series of important cases, several of them decided in the House of Lords, in the middle nineteenth century. The modern documentary credit, however, was developed in connection with the c.i.f. type of sales contract which did not come into general use until the present century, and which dominated overseas trade during the period between the wars. A good deal of the law evolved for the purposes of the earlier types of credit operation was apposite to the documentary credit, but that type produced many new problems, and in any case the older decisions did not by any means cover all the ground.

It is not surprising, therefore, that in the years immediately before the First World War, and more particularly in the 1920's, there was a good deal of litigation in regard to these credits. Nevertheless, the basic principles of the law remained obscure, and there was a growing demand from commercial lawyers for a competent textbook on the subject. This did not appear until 1932 when the late Professor Gutteridge, relieved of the heavy burden of his London chair, was able to find time to put into a book the thought which he had been giving to the subject during the preceding years, and the material which he had been collecting. The result was at once hailed as a little masterpiece of lucidity, and welcomed for its systematic handling of the refractory case law.

Professor Gutteridge had had the advantage of some earlier work on the subject done in the U.S.A. and also of the fruitful thinking of some Continental lawyers who had discovered the fascinating juristic problems raised by the documentary credit. He had also, no doubt, profited by teaching banking law to some exceptionally gifted pupils. One of these, Professor A. G. Davis, was to write the only other English legal treatise on the subject (see a review of the second edition in 18 M.L.R., p. 640), and another, Maurice Megrah, who was to become secretary of the Institute of Bankers, undertook in collaboration with his old teacher to produce a second edition of the work under review.

Unfortunately, Professor Gutteridge's health broke down before he had been able to embark upon the task, and the new edition is entirely the work of Mr. Megrah. It will be clear from what I have already said that I am not being critical of the first edition when I say that the new one is almost a new work, and that its practical value far transcends the earlier one. Owing to the complete absence of case law on several aspects of the subject, and of its sketchiness on others, Professor Gutteridge was unable to deal with them, or could deal with them only in a somewhat cursory manner. Mr. Megrah had the unique advantage of being a lawyer, with a specialist knowledge of the subject, working at the Institute of Bankers in the very heart of the financial metropolis where the documentary credit had been developed. He was thus able to obtain a first-hand knowledge upon every aspect of the working of the institution and to subject the material to skilled legal analysis. He was able to give to the banking world and to the legal profession some part of the result of his researches and studies in

his two courses of Gilbart Lectures on the subject (1951 and 1952). Here we have the result of his more systematic and mature consideration of the whole subject, and the result is undoubtedly a work of the first importance in commercial law.

The earlier chapters on the mechanism of the credit, the types of credit, and the legal aspects of the contract created by the issue of the credit, follow the first edition pretty closely. Towards the end of the third chapter, however, important changes begin to occur. Thus, Mr. Megrah devotes a special section to the problem of consideration in which he substantially expands the material provided by Professor Gutteridge. Nowhere else in the law of contract do such difficult points arise in relation to consideration as in the law of bills of exchange and credits, and it is rather puzzling that they are so cursorily dealt with in the classical works on contract. The short section on assignability of commercial credits which did not fit in very well with the remainder of the subject-matter of Chapter III, Mr. Megrah has transposed to a new chapter, appropriately placed towards the end of the volume, and which he has been able to build up into a much more satisfactory treatment of this difficult subject by using American, and, to some extent, Continental material.

It is as from Chapter IV, which deals with the contractual relationships arising under the credits, that the material of the first edition is expanded so substantially that the present edition must be regarded as in the nature of a new work. Thus the right of recourse, an important and difficult subject, hardly more than touched upon previously, is fully and effectively discussed, including the interesting development of the "back to back" credit.

Chapter V deals with the tender of the documents, which, vital as they are under the c.i.f. contract, are naturally equally fundamental to the documentary credit, and it is here, therefore, and naturally, that the disputes arise which bring these credits before the courts. The bill of lading being the most characteristic and variable document in the set of documents usually required has given rise to the most trouble. In this subject there have been several important cases since the first edition which have assisted Mr. Megrah to give it a much fuller treatment, and this he has filled out with important new material he has obtained from the banks.

It is pity that the illuminating discussion of the documentary position under these credits contained in the judgment of Devlin J. in *Seymour* v. *Midland Bank* [1955] 2 Lloyd's Rep. had not appeared when this work went to the press. Mr. Megrah has, however, been able to obtain a great deal of invaluable material on aspects of the documentary problem which were not available to Professor Gutteridge, and he has thus been able to deal effectively with important subjects not touched upon in the first edition, *viz.*, refusal of documents, loss of documents, ratification, and, most important of all, indemnities. This difficult subject has been but little before the courts and then only in recent cases. By making use of one important American decision, of South African material, and above all of his own researches, Mr. Megrah has been able to provide a valuable discussion of the subject.

In connection with the banker's security for his advances, the amount of new material available is inconsiderable, and the original chapter stands substantially unchanged, except for the addition of an interesting discussion of the transferable credit.

Professor Gutteridge would have been pleased that Mr. Megrah has been able to raise his short appendix on Conflict of Laws to the dignity of a Chapter. Not that there has been much new case material, but that the International Chamber of Commerce has in the meanwhile issued its important Uniform Customs and Practice for Commercial Documentary Credits. A great deal of thought over many years has gone into the framing of these rules, the use of which would certainly obviate many of the difficulties which

now arise, and it seems a pity that they have met with such a lukewarm, if not hostile, reception from the British banks. The practice of the latter is, of course, different in a number of material respects from that prevailing on the Continent and even in America, but one would have thought that with good will the differences could have been carried out. Much of Mr. Megrah's chapter on Conflict of Laws consists of a discussion of these rules which are themselves set out in full in an appendix. In other appendices there are given a useful glossary of terms, and a very varied selection of forms, running to no less than thirty pages, as against nine in the first edition.

It speaks cogently for Professor Gutteridge's knowledge and skill that Mr. Megrah has found so few occasions when he deemed it necessary to correct the original text: his revision is almost entirely by way of addition. And this work, as will be apparent from what has gone before, he has carried out in a most thorough and conscientious fashion. Unfortunately he does not possess Professor Gutteridge's felicity, or indeed lucidity, of style, and occasionally I found myself reading his text more than once in order to make sure that I had understood his meaning. Apart from this, I have no criticism to offer, and congratulate him on having been able to place both bankers and lawyers so much in his debt.

C.

Problèmes Juridiques des Emprunts Internationaux. By G. Van Hecke. [Leiden: E. J. Brill (Bibliotheca Visseriana). 1955. xviii and 310 pp. 38 guilders.]

The title-page of this important book modestly conceals the fact that the author is a Professor at the University of Louvain and an *avocat* in Brussels. But the reader will notice very quickly that the book is written by a lawyer of distinction and experience who has made a significant contribution to the solution of the difficult legal problems connected with international loans.

After an introductory chapter Professor Van Hecke proceeds to analyse the legal nature of an international loan and, in particular, of a State loan. In his third chapter he discusses with great care the question of the determination of the proper law and arrives at conclusions which, by and large, are in harmony with English practice. There follows a chapter in which the author defines the ambit of the proper law of the contract and the influence of the *lex loci contractus* and the *lex loci solutionis*; an interesting point of view of some novelty is being put forward in regard to what the author describes respectively as *lois de police du contrat* and *lois de police extra-contractuelle* (pp. 120 *et seq.*). The fifth chapter deals with the effect of monetary legislation on international loans; its 106 pages constitute the most comprehensive and reliable treatment of monetary law, which is at present available in the French language. The sixth and last of the principal chapters is devoted to the debtor's default and the defence of creditors' rights; it includes a useful survey of legislation designed to secure the effective representation of bondholders.

These short indications of the contents of Professor Van Hecke's work will, it is hoped, be sufficient to make it clear how wide a field is covered by it. The work is built on a broad comparative basis; according to the Preface (p. xi) the comparative method is:

> ". . . pour un juriste belge la manière d'être fidèle à la mission propre de son pays; être un carrefour des cultures anglo-saxonne, germanique et latine."

The practice and the literature which appeared in the principal Western countries before March 1954 are noted carefully and almost exhaustively

and, on the whole, correctly interpreted. (There are, however, a few exceptions: thus *Pyrmont* v. *Schott* [1939] A.C. 145 has been misunderstood (p. 215); at p. 234 the author commits the very common error of treating *Perutz* v. *Bohemian Discount Bank* (1953) 110 N.E. (2d) 6 as if the case involved an application of Art. VIII (2) (b) of the Bretton Woods Agreement; at p. 249 it is not made clear that the functions of the Council of Foreign Bondholders are limited to public loans.)

It would not be appropriate to the character of this work to take up the one or the other point on which one is inclined to agree or disagree with the learned author. Two general observations, however, will perhaps be permitted. On the one hand, a lawyer brought up in the Latin tradition of legal thought might have been expected to indulge in the propagation of many of those unrealistic doctrines which in the past have dominated the discussion of monetary problems by French jurists. Professor Van Hecke is wholly free from such influences. His remarks on such matters as the "territorial" or public character of monetary laws (pp. 137, 194, 221, *et seq.*) or public policy (see, in particular, p. 197) strike one who remembers other writings in the French language, as a welcome breath of fresh air. On the other hand, the really grave *practical* problem of international investment is how to secure repayment in accordance with the contractual terms and to protect the lender against the default of borrowers who sometimes far too readily exploit every method of defence which seems to be open to them. The conclusions which Professor Van Hecke formulates in his last chapter and which mainly favour the adoption of *Règles Uniformes* and of a transfer guarantee do not solve the practical problems of an individual bondholder whose debtor has no appreciable assets outside the restricting state or succeeds in arranging his affairs so as to be immune from attack. It may well be that it is the question of remedies and methods of execution rather than the substantive law that requires the special attention of the draftsman. Perhaps at some future date Professor Van Hecke will apply his acute mind and great knowledge to these aspects of his subject.

F. A. Mann.

Newman on Trusts. By Ralph A. Newman, Professor of Law, St. John's University School of Law. Second Edition. [Brooklyn. U.S.A.: The Foundation Press Inc. 1955. 600 pp. $5.50.]

This is not a book to be indiscriminately recommended to students in England. The book shows a lack of balance which is capable of misleading. Thus, while resulting trusts occupy pages 272–302, most of them in historical discussion, the liability of the trustee is dismissed in eight pages (pp. 459–467). Apart from this, however, the book contains far too many inaccuracies to be reliable. Thus the statement on p. 3 about "the attitude of modern law in converting the interest of the beneficiary of a passive trust into a corresponding legal estate" is ambiguous, and is incorrect if it is intended to indicate that the conversion is automatic and independent of any steps taken by the beneficiary. The definition of a trust (pp. 3–4) is inadequate in that it ignores the possibility of a trust of an equitable interest. The quotation from Lepaulle (p. 4) to the effect that the trust seems indissolubly tied to the distinction between common law and equity and has no equivalent in any other system of law is not entirely happy. It is not the division into common law and equity which alone makes the trust possible. It is the doctrine of estates as well: after all, Roman law had the *jus civile* and

the *jus honorarium* but no trust. The dogmatic assertion on p. 47 that "in English law precatory words such as 'request' and 'wish' are construed as matter of law to indicate an imperative direction" is clearly incorrect. Certainly *Re Steele's Will Trusts* [1948] Ch. 603 which is relied on to support the contention that the English courts have not receded from their earlier position, does not go nearly as far as this. The statement on p. 127 that "in England the law is settled that the *cestui's* interest is a property right and not merely a personal right against the trustee" is far too wide, and the breadth of the proposition is certainly not supported by *Baker* v. *Archer-Shee* [1927] A.C. 844 upon which the author relies. The statement on p. 146 that in England "the effect of the protective trust is that in case of an attempted assignment . . . the interest of the beneficiary becomes restricted to the *right* to have the income applied for the maintenance of himself, his spouse and children . . ." is strictly incorrect; the principal beneficiary acting by himself after the forfeiture has no right to anything. In future editions *Re Coats' Trusts* on p. 182 will require further elucidation in the light of the House of Lords decision and the status of *Re Caus* which is dealt with on p. 183 will need to be revised. The statement on pp. 191–192 that "in England trusts for the education of descendants of specific named persons are deemed charitable trusts for the relief of poverty rather than for education" represents a misreading of the cases and is an inexcusable heresy. The statement on p. 403 that "in England the Trustee Act . . . makes each trustee liable only for his own acts" needs expansion to show that an apparently blameless trustee is often guilty of an act, neglect or default on his own part which makes him liable. Footnote on p. 436 relating to the cases in which a trustee is entitled to remuneration is not exhaustive. While these instances show that the book contains too many errors about the English law to make reliable reading for our students, it contains much useful information about the American Law of Trusts: in this regard the chapter on Termination (pp. 468–501) is both instructive and interesting.

O. R. Marshall.

A Guide to Land Registry Practice. By John J. Wontner. Seventh Edition. [London: The Solicitors' Law Stationery Society Ltd. 1955. 219 pp. with index. 25s. net.]

"Since the previous edition was issued two more areas have been added to the compulsory areas, namely, the County of Surrey . . . and the City of Oxford . . . With regard to Surrey the County Borough of Croydon was already a compulsory area."

So writes the author in his preface, and since the publication of this edition perhaps the most significant development in the progress of compulsory areas for registration of title to land has been the leap forward to the north of England in the addition of Oldham, a centre of the cotton manufacturing cluster of industrial boroughs of Lancashire. Whether the adage "What Lancashire says today, England says tomorrow" will apply to land transfer and registration remains to be seen, but the flight to the north is at least noteworthy. While, of course, a first hand knowledge of the technique of land transfer by registration of title is a daily necessity for legal practitioners in compulsory areas, some acquaintance with its principles and methods are requisite everywhere, for vendor and purchaser are not invariably resident in the area of requisition and one or other, or both, may consult practitioners in non-compulsory territories. For the experienced, *Wontner* has now for over a quarter of a century been the ever-ready reminder of the "why and wherefore and whereby" of land transfer technique, while for

those who find the practice unfamiliar territory *Wontner* is the guide *par excellence* to the "know how" of what, for them, must be a conveyancing expedition where it is essential to tread warily.

Especially to be commended to the latter sphere of readers is the first chapter entitled "What Land Registration is," a most lucid explanation of the system as a whole. Chapter 2, dealing with Restrictive and Positive Covenants and Overriding Interests is remarkably informative in a short space, and Chapters 2 and 5 dealing respectively with "The Practice on First Registration" and "Transfers (whole and part) on a Sale," may be regarded as the core of the book in respect of practice, as Chapter 1 is of principles.

Chapters 13 and 14, dealing respectively with "Notices, Cautions and Priority Notices" and "Searches," illustrate the "take over" from the practice of private conveyancing of methods adapted to the technique of land transfer, and in some cases new terminology disguises the family likeness, but *Wontner* succinctly illuminates. Practice Notes of the Joint Advisory Committee of the Law Society and H.M. Land Registry have been incorporated into the text, but the *Law Society's Gazette* should be regularly consulted to note any later guidance as to the practice.

A set of Forms and Precedents, the Fee Order of 1930, Tables of Costs in the Registry and the Order as to Solicitors' Remuneration are included in an Appendix.

A perusal of *Wontner* reminds the reader how greatly the principles of land transfer since Part II of the Land Transfer Act, 1897, helped in the raising of the structure of the 1925 Property Acts in relation to private, that is, unregistered conveyancing. Indeed, a reading again in particular of the Law of Property Act, 1925, and the Settled Land Act, 1925, makes a good preparation for the better understanding of land transfer by registration. The book does not profess to dispense with the use of larger treatises but worthily fulfils its purpose as a "Guide."

Land registration is not one of those branches of the law in which cases represent a predominant feature and no Table of Cases is included, and, having regard to the nature of the subject and the scale of the book, is not called for. *Wontner* is an indispensable desk companion for the conveyancing practitioner in either branch of the profession, and a first book for those who are beginning to learn the law of the transfer of property in land.

Bertram B. Benas.

Law and the Engineer. By C. F. Mayson, with a Foreword by Sir Alfred Denning. [London: Chapman & Hall. 4 Appendices + Glossary + Bibliography + Index + 388 pp. £3 3s.]

The author is both a member of the Bar and a qualified engineer, and this somewhat unusual combination of skills has resulted in the production of a remarkably well-written book.

In the first forty-one pages the reader is introduced to the machinery of the civil law. The author explains the historical growth of common law and equity, and comments upon the courts and the judges, the law reports and the doctrine of precedent, and boldly attempts to explain to laymen the law of evidence. There are a few lines of advice upon conduct in the witness-box, which one hopes will not pass unobserved by the expert witness.

Rather more than half the book is occupied by the author's treatment of the law of contract. This follows the usual lines of the textbooks, although the frequent illustrations are taken, whenever possible, from cases having an engineering flavour. It is a little disappointing that the author adopts, in his

treatment of mistake, the three-fold division of common, mutual and unilateral mistake. This division is conspicuously incomprehensible to many students, who prefer to approach the topic of mistake as to subject matter as a branch of the formation of the contract; can an intelligent bystander, listening to what the parties say, formulate the terms of a rational contract?

The groundwork of contract over, there follows a section upon agency in general, *del credere* and mercantile agents, brokers, factors and auctioneers. This part of the book is rounded off by a discussion of bailment, hire-purchase agreements, export contracts, and an introduction to the conflict of laws, and contracts of employment. It is a little unusual to find agreements in restraint of trade in a chapter of their own, right at the end of the contract section, instead of their more usual resting place among illegal contracts.

Part III of the book is headed "The law of negligence." Although many law students subscribe to the view that there is one tort only, and negligence is its name, it is rather surprising to find in this part of the book such bedfellows as nuisance and the liabilities of occupiers of premises. The basis of liability in negligence, which forms the first chapter in Part IV, is said to be the breach of one's duty to one's neighbour, and Lord Atkin is duly cited. It is pointed out that the injury must be physical if a breach of that duty is to be relied on, and that there is no liability in tort for negligent words; but the other exceptions to *Donoghue* v. *Stevenson* are passed over in silence. Although the author does full justice in later pages to the breach of statutory duty, it is a pity that it is not explained earlier in that chapter upon the basis of the law of negligence. In Chapter 19, on the liabilities of occupiers of premises, the author fails to distinguish between liability for the static condition of the premises and liability for negligent acts performed on the premises; a fruitful source of confusion to the law student. The main work concludes with a chapter on the Factories Acts and the regulations made thereunder, and an extremely practical chapter on damages. There are two interesting appendices, one on the responsibilities of professional engineers, and a second upon standard conditions of engineering contracts.

The author has a style of composition at once fluid, lucid and authoritative, and the book's turn-out is pleasing. It may confidently be recommended to any engineering student, and not a few lawyers might also benefit from it.

ALLISTER LONSDALE

DER BEGRIFF DES POLITISCHEN IM INTERNATIONALEN RECHT. By WILHELM WENGLER, Professor at the Free University of Berlin, Associé de l'Institut de Droit International. Recht und Staat in Geschichte und Gegenwart. Pamphlet No. 189/190. [Tübingen: Verlag J. C. B. Mohr (Paul Siebeck). 1956. 60 pp. DM. 3.80.]

THE conception of "political acts" or "political events" plays an inconspicuous part in the contemporary laws of conflict of laws, but is of considerable importance in public international law. It plays an even greater part in the deontological discussion on the relationship between legal and non-legal agencies in international affairs. There are, of course, numerous occasions on which the term is used in some special sense, which as such is without significance elsewhere, as, *e.g.*, in connection with the conception of "political crimes" in the law relating to extradition. Apart from these special occasions, however, no systematic attempt at a general investigation of the meaning of the term and the purpose of those using it has so far been made. The present slim volume fills, therefore, a distinct need. The

author has rightly considered it his task not merely to consider critically those attempts at definitions that have been made in the past, but also to examine the motives which have led States and individual jurists to make use of this conception in recent years. It will be remembered that the demand for the exclusion of political acts from consideration by the courts played a great part in the "contribution" made by national-socialist writers to discussions on international law between 1934 and 1939. It has, since 1945, played a comparable part in the Communist doctrine of international law as is witnessed, *e.g.*, by the opinions of Krylov and Joročič in connection with the admission of new members to the U.N.O. The author's endeavours to go behind the façade of the debate are therefore of great value to students of contemporary events in the field of international law. This value is enhanced by the fact that the author—unlike all too many other authors—has not spared any person in reviewing the use which has been made of the conception of "political acts" in the past. With a most laudable frankness and rare courage he has recalled to the mind of his readers some of the "leit motive" that have been heard before and whose re-emergence from oblivion is as regrettable as that of those who have invented and played them only a short while ago.

E. J. Cohn.

The Courts and the Public Schools. By Newton Edwards. Revised Edition. [University of Chicago Press; London: Cambridge University Press. 1955. xvii and 622 pp. 75s.]

The reaction of the Southern States to the Supreme Court's decision in *Brown* v. *Board of Education* (1954) holding segregation in public schools to be unconstitutional has tended to lead foreigners to pay attention merely to this manifestation of United States judicial activity in the field of education. But this is not the only aspect of learning which has been considered by the courts. Thus, in *Shapiro* v. *Dorin* (1950) the Domestic Relations Court of the City of New York held that it was not contrary to the constitutional ban on governmental interference with the freedom of religion for the State of New York to interdict children from attending a religious school, the syllabus of which was so narrow that it was considered that the children were being denied equality of opportunity in education, and "without equality of opportunity in education there is no equality among the children of our democratic society" (99 N.Y. Supp. 2d 830, *cf.* the writer's "The Right to Learn: A Comparative Study," 3 *Indian Yearbook of International Affairs*, 1954).

For those who are interested in the right to learn, Article 26 of the Universal Declaration of Human Rights has provided a new "basic law." It provides that "everyone has the right to education. . . . Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. . . . Parents have a prior right to choose the kind of education that shall be given to their children." Professor Edwards, in his *The Courts and the Public Schools*, has made it possible to ascertain the extent to which the United States gives effect to this basic law. *Shapiro* v. *Dorin* shows that the first two points quoted from this Article are recognised, and throws light on the true meaning of the right of the parent, for it limits this right when its exercise would conflict with the public good and with the right of a child to obtain an education, in the fullest sense of that word. Unfortunately, however, it is not easy to discover the historical background of this decision from this book, for Professor Edwards has not provided any table of cases. The chapter on "State and Church in Relation to Education" does not help either, for it only deals with the "Separation of State and Church under the Federal Constitution,"

"Transportation of Pupils to Parochial Schools in Violation of State Constitution," "Financial Aid to Sectarian Schools," and "The Holding of Public Schools in Buildings Owned by Religious Groups." The right of a parent to send his child to the school of his choice does not fall under any of these heads.

Closely akin to parental rights of school selection is the problem of racial segregation or integration in the public school system. At p. 11 Professor Edwards points out that most of the cases involving the application of the Fourteenth Amendment to educational questions "have involved race segregation in the schools. These cases will be given extended treatment in a later section." The "extended treatment" consists of 1½ pages (548–549). Here there is a short reference to the "separate but equal" doctrine as enunciated in *Plessy* v. *Ferguson* and an almost equally short statement of the finding of the Supreme Court in the first hearing of the *Brown* case.

Professor Edwards describes his purpose as being "to make clear the fundamental principles underlying the relation of the State to education; (and) to reduce to systematic organisation the principles of the case or common law which are applicable to practical problems of school organisation and administration." There can be no more practical problem in this field than that of admission of students and the provision of schools. Since the preface to the second edition was written in August, 1954, much has happened in this field. When Professor Edwards prepares his third edition he might find it possible, therefore, to devote more attention to this matter from the point of view of both judicial practice and attempted statutory evasion. At the same time, it would be as well if he were to include a table of cases.

L. C. Green.

Annual Survey of American Law, 1954 and 1955. [New York: New York University School of Law. x and 983 (including Index); x and 803 (including Index) respectively. 10 dollars each.]

The hope expressed in this *Review* in 1948 that the *Annual Survey of American Law* would become a permanent institution (11 M.L.R. 369–370, review by G. L. W.) has been realised, for the flyleaf of each of these volumes describes the *Survey* as "now a permanent feature of the New York University Law Centre." The first issue was in 1942, when Chief Justice Arthur T. Vanderbilt of New Jersey was Dean of the New York University School of Law, and since then it seems to have become an indispensable tool for the American student and practitioner, who could otherwise never keep up with the flood of statutes, case law and comment each year in all the American states and the Federal jurisdiction. The pith and substance of thousands of court decisions, periodical articles and other legal publications are here concentrated into forty or fifty articles by the faculty of New York University School of Law and selected guest contributors, under the most able editorship of Professor Robert B. McKay.

The production of such a survey is not without its problems. If any reader on this side of the Atlantic is wondering how the contributors manage to perform this annual miracle, let me assure them that it is not without a formidable organisation which supplies them with the basic material in the form of cut-outs or notations, and that even with this degree of assistance the task of surveying often presents itself as a most exacting and boring chore to the person responsible, with the result that some of the contributions become mere catalogues of current developments and that the quality of the

contributions is variable. Furthermore, as the contributions are printed serially in the *New York University Law Review*, this leaves little space for other articles. There are already signs of a revolt against the restrictions which an annual survey like this necessarily imposes on the contributors, as witness the lively articles by Professor Edmond Cahn under the heading Jurisprudence, which do not purport to contain an annual survey, but merely an annual essay by this distinguished Professor on some theme in the realm of legal theory related to current judicial controversy in the Supreme Court or elsewhere, followed by a brief and highly selective list of "other noteworthy items."

The *Survey* includes two large sections dealing with Public Law, one dealing with International Law and the United Nations, Conflict of Laws, Constitutional and Administrative Law, and Criminal Law, and the other dealing with Governmental Regulation (Food and Labour Law, for example) and Taxation. Part Three deals with Commercial Law, Torts and Family Law, Part Four with Property and Procedure (a strange mixture), while the rest of the *Survey* (Parts Five and Six) is devoted to Legal Philosophy and Reform, and Legal Literature.

The volume for 1954 is dedicated to Dr. A. L. Goodhart "for his many and notable contributions to the development of Anglo-American understanding," and Chief Justice Vanderbilt writes a splendid tribute to him in the Foreword. This speaks of a new emphasis in England and the United States upon the interchange of legal knowledge. It seems likely that these volumes have something to contribute in promoting this most desirable development, for they may be regarded as essential reading for the English scholar who wishes to form a picture of the legal scene in America, or who, having visited that country, desires to keep in touch. It is no exaggeration to say that the best way to learn what is going on in your subject in the United States is to read the relevant contribution in this *Survey*.

J. E. Hall Williams.

Treaties and Federal Constitutions. By James McLeod Hendry. [Public Affairs Press, Washington D.C. 186 pp. $4.50.]

Taking the United States, Switzerland, Canada and Australia as examples, Professor Hendry has examined the problems which Federal, as opposed to Unitary, constitutions pose in the conclusion and execution of treaties. He insists, and rightly so, that we distinguish between the "capacity" of the State to enter into an international agreement and the "performance" of the obligations thereby assumed. His conclusions, based upon a comparison between the four Federal States taken as examples, are constructive and well considered. He believes, for example, that the principle of participation by the legislature in the actual treaty-making process, seen in the requirement of consent by a two-thirds majority of the U.S. Senate, is detrimental to the State's ability to enter confidently into the many aspects of international life which were never really envisaged when these Federal Constitutions were drafted. The frequent use of the excutive agreement is, in his view, a symptom of the embarrassment caused by this check. Moreover, since he regards the executive agreement as part of the law of the land, with a force equal to that of the treaty (a view not universally held), the value of the check is questionable. In general he is of the view that constitutional limitations upon treaty-making powers are not matters which, under international law, ought to be within the cognisance of other States; his most forceful argument is the very uncertainty as to what these limitations really

are, an uncertainty which is apparent from judicial decisions within the Federal States themselves.

So far as the question of performance of treaty obligations is concerned, then "the distinctive Federal problem is that the central authority often does not have the legislative power to perform the obligations upon which it has entered, that power being vested in the component States." Here he concludes that Canada is, of the four, at the greatest disadvantage; the blame lies partly on the Privy Council in taking a strict and conservative approach to the problem of interpreting the British North America Act, and partly on the accidental fact that the Constitution was drafted at a time when Canada's participation in international affairs was, except through the British Government, non-existent. The end result is, in Professor Hendry's view, that Canada at the present moment is not in a position either to assume or discharge the obligations which its international status demands it should accept. Of the two possible solutions to this problem he prefers amendment; the path of judicial reinterpretation lies only through the rejection of the Privy Council as a supreme court on constitutional questions, together with its precedents, and this, argues Professor Hendry, would have its disadvantages.

The problems are lucidly developed and the interest of the subject is unquestionable. With the main thesis one can easily find agreement, but the scholarship is slightly marred by what one must assume to be bad proof-reading. Examples appear on pages 42 and 173; there is a sentence on page 25 which is quite incomprehensible and a quotation on page 150 which must be wrong. The other thing which may inconvenience readers is the practice of putting all the footnotes at the end of a chapter; this may be a personal idiosyncrasy, but this reviewer prefers to glance at the foot of a page rather than keep a thumb perpetually at the end of the chapter. There is, finally, one sentence which shocks: "A treaty may be terminated, for example, if it is shown that the other party has taken advantage of the other's constitutional limitations to obtain some selfish end. Such cases depend on the facts" (p. 157): it would be interesting to see some authority for this statement.

D. W. BOWETT.

INTERNATIONAL POLITICAL SCIENCE ABSTRACTS. Vol. V, No. 1, 1955. [Oxford: Basil Blackwell. 1955. v and 153 pp. 10s. 6d.]

AMONG the various educational efforts supported by UNESCO out of its meagre budget is the publication by the International Political Science Association, with the co-operation of the International Committee for Social Sciences Documentation, of a Quarterly devoted to short summaries of articles appearing in various journals and relating to political science in its widest connotation.

In the present issue there are seven items in the field of political science proper, including Dr. Bunche's presidential address to the American Political Science Association; twenty-seven on political theory, including two Soviet contributions on sovereignty, Dr. Bernard's "Considérations sur la théorie sociologique de l'État dans le système de Duguit," and Professor White's discussion of "The Problem of Loyalty in American Political Thought." These are followed by 160 entries on government and administration, of which 121 concern central government, including Professor Gledhill's study of "The Burmese Constitution" in the *Indian Yearbook of International Affairs*, 1953, Mr. Griffith's paper on "Judicial Attitudes to Administrative Powers" in the *British Journal of Administrative Law*, 1954, and a number

of papers on the British civil service, the Bricker Amendment and segregation in the United States. A further twenty-one entries deal with State and local government, while the section on government is completed by nineteen abstracts of articles on colonial administration. The entries on municipal political life are completed by a section of fifty-four items on governmental process, understood as comprising public opinion, parties, groups and elections.

Part V of the Quarterly deals with international relations. Under this rubric there are included twenty-eight items on international organisations and administration and seventy-eight on international politics. Finally, there are twenty-five references to area studies. It is in the international sections that omissions are most noticeable. If the *Indian Yearbook of International Affairs* is abstracted, there is no reason why the *Year Book of World Affairs* and the *British Year Book of International Law* are not treated in the same way. Similarly, where Quarterlies are concerned, it is a little surprising to find no reference to the *American Journal of International Law, La Communita Internazionale, Politique Etrangère,* the *Review of International Affairs* (Belgrade), or *World Affairs* (both Toronto and Washington versions).

For the student of political science these *Abstracts* serve as a guide to the current literature in his field, and he should find particularly attractive the offer to supply, on the same terms as are available to specialised agencies, microfilms of any of the articles abstracted if it should not prove possible to consult the actual periodical involved.

L. C. Green.

Estate Duty and Private Companies. By A. R. Ilersic, m.sc. (Econ.), b.com. [The Incorporated Accountants' Research Committee. 1955. 24 pp. 4s. net.]

This pamphlet in the "Practice Note" series is a well-written account of the dispute about the levying of estate duty on private companies. The author discusses, with a considerable measure of objectivity, the various arguments in favour of amendment or repeal of section 55 of the Finance Act, 1940, and regards as wholly inadequate the amendments in fact introduced by the Finance Act, 1954. He considers that the section should be further amended so that valuation under it only applies where the deceased has become vested with control by design and not by accident. This hardly seems a likely development in view of the known, and natural, reluctance of the Revenue to accept a legislative ruling which forces them to prove the motive for a particular transaction. He also favours the setting up of a independent valuation tribunal (notwithstanding the rejection of this proposal by the Evershed Committee), somewhat disingenuously suggesting that this would be welcomed by the Estate Duty Office as offering it a glorious opportunity of demonstrating its fairmindedness. The general impression left on one reader was that Mr. Ilersic proves once more that the section may operate unfairly but gets us no nearer to a practical alternative. But his monograph is a useful summary of the events and arguments leading to the 1954 amendments and it constitutes a valuable addition to this excellent series.

L. C. B. G.

COMPANY MEETINGS. By W. F. TALBOT, F.C.I.S., F.T.I.I. Second Impression Revised. [London: Stevens & Sons, Ltd. 1955. xii and 178 pp. 17s. 6d. net.]

THAT this book serves a useful purpose is shown by the fact that a second impression has been needed after four years. The only noticeable revision is that p. 24 has been rewritten in the light of *Re Hartley Baird* [1955] Ch. 143. In the review of the first edition in Vol. 16 of this *Review* at p. 127, comment was made upon the high price. It is, therefore, particularly pleasing to note that this has now been reduced by 22 per cent.—and this at a time when the publishers are increasing the price of most of their books.

L. C. B. G.

Books and Publications Received

ARCHBOLD'S CRIMINAL PLEADING, EVIDENCE AND PRACTICE. Thirty-third Edition. Seventh Cumulative Supplement. January 1, 1956. Edited by T. R. FITZWALTER BUTLER and MARSTON GARSIA. [London: Sweet & Maxwell, Ltd.]

BRIEF SUMMARY OF THE IMPORTANT PROVISIONS OF LAW RELATING TO ANIMAL WELFARE. By the Hon. Parliamentary Secretary of U.F.A.W. [The Universities Foundation for Animal Welfare, 7a Lamb's Conduit Passage, London, W.C.1. June, 1955. 28 pp. Price 6d.]

DICTIONARY OF LEGAL TERMS. Spanish-English and English-Spanish. By LOUIS A. ROBB. [Chapman & Hall, Ltd., 37 Essex Street, London, W.C.2. x and 228 pp. 64s. net.]

HANDBOOK OF CHILD LAW. Supplement to the Fourth Edition. [Sir Isaac Pitman & Sons, Ltd. 1955. 22 pp. 5s. net.]

THE ABOLITION OF WAR. By F. N. KEEN, LL.B. [The David Davies Memorial Institute of International Studies. Thorney House, Smith Square, London, S.W.1. 54 pp. 2s. 6d.]

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Bulletin of the International Commission of Jurists. No. 3. [November, 1955. 47 Buitenhof, The Hague, Netherlands. 37 pp.]

The British Council, 1934–1955. Twenty-first Anniversary Report. [65 Davies Street, London, W.1. 121 pp. 2s. 6d.]

Key and Elphinstone's Precedents in Conveyancing. Supplement (to Jan. 1, 1956). By E. H. Bodkin. xi and 42 pp. [London: Sweet & Maxwell, Ltd. 4s. net.]

Woodfall's Law of Landlord and Tenant. Second Supplement (to March 1, 1956). By Lionel A. Blundell, LL.B., and V. G. Wellings, M.A. [London: Sweet & Maxwell, Ltd. 6s. 6d. net.]

Oyez Practice Notes No. 24. Robinson's County Court Costs. Second Edition, 1956. By D. Freeman Coutts. 60 pp. [London: The Solicitors' Law Stationery Society, Ltd. 8s. net.]

Bulletin of the International Commission of Jurists. No. 4. March, 1956. [47, Buitenhof, The Hague, Netherlands.]

The Social and Legal Aspects of Sexual Abnormality. By Edward Glover, M.D. Second Edition. 1956. 20 pp. [Published by the Institute for the Study and Treatment of Delinquency. 1s. 6d.]

Polish Institute of International Affairs. Legislation of Poland. 1/55. Mining. 97 pp. Warsaw. 1955.